No. 98-____ (1)

Supreme Court, U.S.
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Supreme Court of the United States

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OCTOBER TERM, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Petitioners,

—v.—

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to Justice Powell's opinion in *Bellotti v. Baird*, 443 U.S. 662 (1979), that a state may require parental notification of an abortion for a mature minor in every case except where the minor alleges prior abuse or neglect?

2. Whether the court of appeals erred in treating the burdens imposed by forced parental notice of abortion for non-abused mature minors, the state purposes underlying such forced notice, and the extent to which such notice serves legitimate state interests, as matters of law rather than as questions of fact, contrary to this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)?

3. Whether the court of appeals erred in holding, contrary to this Court's opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), that there exists a parental right to know about a mature minor's abortion decision?

PARTIES TO THE PROCEEDING

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Petitioners Planned Parenthood of the Blue Ridge, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on August 20, 1998.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia granting a preliminary injunction was filed on June 30, 1997. A-89-104.[1] The opinion of the United States Court of Appeals for the Fourth Circuit was issued on August 20, 1998. A-2-88. The opinion of the court of appeals is reported at 155 F.3d 352 (4th Cir. 1998). The opinion of a single judge of the court of appeals staying the preliminary injunction is reported at 116 F.3d 707 (4th Cir. 1997) (Luttig, J.), and the Order of the court of appeals denying a motion to vacate the single-judge stay is reported at 125 F.3d 884 (4th Cir. 1997). The opinion of the district court is unreported.

JURISDICTION

The opinion as to which review is sought was issued on August 20, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, which provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Va. Code Ann. § 16.1-241(V). A-105-108.

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[1] The opinions and statutory provisions involved are reprinted in the Appendix to this Petition. Citations to the Appendix are made in the form "A-__."

STATEMENT OF THE CASE

The Virginia Parental Notice Act, Va. Code Ann. § 16.1-241(V) ["the Act"], was signed into law by the Governor of Virginia on March 22, 1997, and took effect on July 1, 1997. The Act prohibits physicians from performing abortions for an unemancipated minor unless a parent, legal guardian, or person standing *in loco parentis* [collectively, "authorized persons"] has been given at least twenty-four hours notice of the abortion.[2] The Act defines an emancipated minor as one: who has been married; who is on active duty with the armed forces of the United States; or who, with the consent of her parents, is willingly living apart from them. A-107.[3] The Act is an anomaly in Virginia, which generally allows minors to consent as adults to a wide range of mental health care, family planning and substance abuse treatment. *See* Va. Code Ann. § 54.1-2969(D).

The Act purports to contain two exceptions to the notice requirement. First, notice is not required if the minor declares to the physician that she has been the victim of abuse or neglect, and the physician "has reason to suspect that the minor may be an abused or neglected child as defined in [Va. Code Ann.] § 63.1-248.2 and reports the suspected abuse or neglect in accordance with § 63.1-

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[2] "Abortion" is defined to include "interrupt[ion] or terminat[ion] [of] a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage as provided in § 18.2-72, 18.2-73 or 18.2-74." A-107.

[3] The Act also states that a minor is emancipated if she has obtained an order of emancipation under Va. Code § 16.1-331, but this statute mimics the three specific bases for emancipation set forth in the Act itself. The Act therefore does not exempt minors who have obtained "common law" emancipation, to the extent such a status remains available in Virginia. *See Brumfield v. Brumfield*, 74 S.E.2d 170, 173-74 (Va. 1953) (discussing "complete" and "partial" emancipation).

248.3."[4] A-106. Second, notice is not required if "the abortion is medically necessary immediately to avert the minor's death," or if "there is insufficient time to provide the required notice or judicial authorization because a delay would create a serious risk of substantial impairment of a major bodily function or substantial physical injury." A-106.

"Notice" may be accomplished in four ways. Notice is achieved if: (1) "the physician or his agent has given actual notice of his intention to perform [the] abortion to an authorized person, either in person or by telephone, at least twenty-four hours previous to the performance of the abortion"; (2) certified, return-receipt-requested mail is delivered to an authorized person 72 hours before the abortion (but such notice is only permitted "after reasonable effort to notify an authorized person"); (3) one authorized person is present with the minor seeking the abortion; or (4) the minor delivers to the physician a written statement signed by an authorized person stating that the authorized person knows of the minor's "intent" to have an abortion. A-107.

The Act permits a minor to seek a judicial waiver of parental notice, in the first instance, from the Virginia Juvenile and Domestic Relations Court ["JDR court"]; if her request is denied, she may appeal to the circuit court. The JDR court first determines whether "the minor is mature and capable of giving informed consent to the proposed abortion." A-105. If the JDR court finds the minor to be "mature and capable of giving informed consent," the court "may" grant judicial authorization to proceed with the

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[4] If a report is made, the abusive parent will receive, at a minimum, a report from the social service agency stating whether the report was founded or unfounded. *See* A-51 n.8. However, in a case where the minor is in "imminent danger" -- such as incest -- the social services agency may attempt, without court order, to take immediate custody of the minor. Va. Code Ann. § 63.1-248.9(A)(1). Of course, such an attempt may result in *de facto* immediate notice to the parents.

abortion without parental notice. A-105.[5] Thus, according to the plain language of the statute, the JDR court is given unfettered discretion to *deny* authorization for the abortion if the minor is found to be mature. Forms promulgated by the Office of the Executive Secretary of the Virginia Supreme Court ["the Executive Secretary"] confirm this grant of discretion by explicitly providing the JDR court with a check-off box to "deny" a judicial waiver of parental notice upon a finding that the minor is mature. A-109.[6]

The Act contains a general statement providing that judicial bypass proceedings "shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor." A-105. However, the Act contains no guarantee that court *records* of proceedings shall be confidential.

The Act also sets no time limit within which the JDR court must *decide* the minor's petition. It only provides that the proceedings "shall be *heard* as soon as practicable but in no event later than four days after the petition is filed." A-105 (emphasis added). Nor is the minor protected by the Act's provision directing automatic authorization for an abortion if the JDR court "fails to act within the time periods" prescribed, because there is no time period set for decision by the JDR court. Thus, the Act gives to JDR

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[5] In contrast, if the JDR court finds the minor is "not mature," the judge "shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's best interest," and, if the court finds "that the abortion would be in the minor's best interest, it *shall* so authorize a physician [to perform the abortion]." A-105 (emphasis added). In other words, in such cases, the JDR court has no discretion to deny authorization for the abortion.

[6] Likewise, guidance issued by the Executive Secretary to the JDR courts calls attention to the constitutional problems raised by the Act's grant of discretion to the JDR court to deny judicial authorization for an abortion to a minor found to be mature. A-112-13.

judges authority to withhold *decision* on the minor's petition for an indefinite time period. The Executive Secretary's guidance to the JDR court confirms this discretion. A-113 ("Section 16.1-241(V) explicitly requires the circuit court to *hear and decide* the matter not later than five days after filing, but it directs the juvenile and domestic relations court only to *hear* the proceeding not later than four days after filing. Therefore, while the circuit court cannot avoid issuing either a decision within the specified time frame or a 'default authorization,' it appears that the statutory language would permit the juvenile and domestic relations district court to take the matter under advisement. . . . Taking these petitions under advisement presents a serious 'slippery slope' problem. Once the statutory four day time frame is breached, there is no corresponding statutory brake to apply when one begins to move down that 'slippery slope.'").

By contrast, if the minor does not obtain a judicial waiver of parental notice and appeals to the circuit court, the appeal "shall be *heard and decided* no later than five days after the appeal is filed." *Id.* (emphasis added). Nevertheless, because the minor may appeal to the circuit court only if the JDR court "denies an order authorizing an abortion without notice," A-105, if the JDR court withholds a decision, the minor has *no* recourse but to wait and forego her right to obtain an abortion completely -- or to notify a parent against her will and better judgment, potentially exposing herself to risk of serious harm.

The Act provides for no further appeals beyond the circuit court. Thus, if the minor loses her appeal in the circuit court, a further appeal to the Virginia Court of Appeals or Virginia Supreme Court, if any is allowed, will occur without any time limitations or guarantees of confidentiality. Moreover, since the "appeal" to the circuit court from the JDR court is *de novo*, the Act establishes no mechanism for genuine appellate review.

On June 12, 1997, petitioners, a group of physicians and clinics that provide abortions for women under the age of 18 and make abortion referrals for these women, filed this case in the United States District Court for the Western District of Virginia, and at the same time sought a temporary restraining order and a preliminary injunction against enforcement of the Act. The district court held a non-evidentiary hearing on plaintiffs' motion for temporary injunctive relief on June 26, 1997. On June 30, 1997, the district court issued a preliminary injunction against enforcement of the Act. The district court, consistently with every other court to address the issue, held that a parental notice statute must contain a judicial bypass mechanism satisfying the criteria established by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"), for parental consent statutes. A-97-98. The district court held that the Act's judicial bypass mechanism is inadequate because it allows a court to deny a mature minor an abortion even if the minor is found to be mature. A-101.

On the same day that the district court issued the preliminary injunction, Respondent ["the state"] sought a stay of the injunction from Circuit Judge Luttig, proceeding under a rule of the Fourth Circuit permitting emergency motions to be made directly to a single judge of that court in chambers. Judge Luttig granted the state's motion within hours and issued an opinion supporting the stay on July 3, 1997. *See* 116 F.3d 707 (4th Cir. 1997) (Luttig, J.). The court of appeals *en banc* denied Petitioners' motion to vacate the stay on October 20, 1997, by a 7-5 vote. *See* 125 F.3d 884 (4th Cir. 1997) (en banc).

On August 20, 1998, the court of appeals *en banc* vacated the preliminary injunction and, ruling upon the merits, remanded the case to the district court with direction to enter judgment for the state. A-69. The court of appeals first held that it would decide the case "on the merits," even though the appeal was from a preliminary injunction, and plaintiffs have

not had an opportunity to present evidence on critical facts. A-16.[7]

The court of appeals then proceeded to the merits, without remanding to allow presentation of evidence on the issues upon which it rested its legal conclusions: that a parental notice statute is *per se* less burdensome than a consent statute. *See* A-39-42. Based on this assumption, the court held that a parental notice statute is constitutional even if it does not contain an alternative mechanism under which a minor, if she proves herself to be mature and capable of giving informed consent, is entitled to a waiver of parental notice. Specifically, the court held that a parental notice is constitutional so long as it "does not condition the minor's access to abortion upon notice to abusive or neglectful parents, absent parents who have not assumed their parental responsibilities, or parents with similar relationships with their daughters . . . ." A-32. The court held that this was true for either a "one-parent or two-parent" notice statute, and that states were free to establish judicial bypass procedures that allow state judges "discretion to require mere notice to the *parents* of even a *mature* minor." A-64 (emphasis added). The court further held as a matter of law that a parental notice requirement does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion," A-32 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992)).

The holding that a parental notice statute need not incorporate a mechanism under which a mature minor is entitled to avoid parental notice was joined by six of the ten circuit judges participating in the decision. The remaining four circuit judges would have held that a parental notice

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[7] The court of appeals, however, incorrectly suggested that the plaintiffs had "agreed" at oral argument that no further factual development in the case was necessary. A-16. The transcript of the oral argument discloses no such concession.

statute must contain a mandatory judicial bypass for mature minors. A-87. These judges, however, would have held that the Act contains such a bypass by construing the word "may" to be mandatory in meaning. A-87.[8] In contrast, the majority opinion does not so construe the Act; instead it "assumes" that Virginia courts *would* construe the Act "to provide a mandatory notice bypass for an *abused* mature minor." A-55 (emphasis added). In other words, the majority opinion appears to assume that the Virginia courts would construe the Act to allow denial of a bypass for a *non*-abused mature minor. The majority below holds that only those mature minors who have suffered abuse or neglect are entitled, as a matter of constitutional law, to make the abortion decision without parental consultation. Moreover, the court held that even in such a case, giving effective notice to parents after the abortion is permissible. *See* A-52 n.8.

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[8] A construction of the Act to render the word "may" mandatory is untenable given the promulgation by the Executive Secretary of forms and written guidance to state judges confirming the discretionary meaning of the term. A-109; A-112. Such a construction should not be rejected by the federal courts unless it is "clearly incorrect." *Macias v. New Mexico Dep't of Labor*, 21 F.3d 366, 369-70 (10th Cir. 1994). Given the state agency construction, a contrary construction by a federal court is not one to which the Act is "readily susceptible," *see Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); instead, such a construction, while theoretically possible, *see Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892, 898 (Va. 1995) ("the word 'may' is prima facie permissive, importing discretion, but the courts construe it to be mandatory when it is necessary to accomplish the manifest purpose of the Legislature"), is proper only if the Virginia Supreme Court, upon certification, overturns the interpretation rendered by its own Executive Secretary. The court below could have availed itself of certification. *See, e.g., Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1074 (1997) ("the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court"); *Bellotti v. Baird*, 428 U.S. 132 (1976) ("*Bellotti I*") (directing certification of questions about the construction of state abortion statute).

The court below also rejected plaintiffs' remaining challenges to the Act, rather than remand to the district court, even though the district court did not reach these claims in its preliminary injunction decision. First, the court evaluated the Act's "medical emergency" exception, which it characterized as "ensur[ing] that the statute's requirements will not endanger the minor's health or life." A-49 n.7.[9] The court held that this exception was constitutional even if it did not "allow abortions without notice when delay would risk the minor's emotional health," *id.*, stating that it "doubt[ed] that the [Supreme] Court would require an emotional health exception even to an abortion regulation that banned certain abortions entirely," and that, in any event, no emotional health exception is required to a statute "that merely delays the contemplated abortion for a short period of time." A-49 n.7.

Next, the court rejected Petitioners' challenge to the adequacy of the Act's protection for the confidentiality of judicial bypass court records, relying principally upon the Executive Secretary's instructions to the JDR and circuit courts to keep the records strictly confidential. The court read these instructions to be cloaked with the imprimatur of the Chief Justice of the Virginia Supreme Court. A-58-59.[10]

Finally, the court rejected Petitioners' challenge to the Act's failure to prescribe any definite time in which the JDR court must decide the minor's request for judicial waiver of parental notice. The court held that the judicial bypass is

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[9] The court wrote that this exception was challenged "for the first time on appeal," A-49 n.7, and suggested that this challenge may have been "waived." *Id.* There could not have been waiver of this argument, which is encompassed within Plaintiffs' Complaint, prior to a final judgment by the district court.

[10] Petitioners do not seek review of the court of appeals' holding that the confidentiality protections of the Act are sufficient, since these protections have been promulgated by the responsible state agency. *See supra* n.8.

sufficiently expeditious because the Act directs the JDR court to give precedence to bypass proceedings "so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor." A-61 (quoting statute). The court also relied upon the Executive Secretary's guidance stating that the decision by the JDR court "should be entered at the end of the hearing," *id.*, and seemingly construed this guidance as conveying "the unmistakable implication" that bypass requests "should be resolved within the statutory four-day period for holding hearings." *Id.* Under the opinion of the court below, a judicial bypass mechanism -- even in a parental consent statute[11] -- need contain no explicit mandatory time limit whatsoever on when the state court must decide the minor's request for a bypass.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with the decisions of this Court on three important issues of federal law. *See* Sup. Ct. R. 10(c). The decision below also conflicts with the decision of every other United States court of appeals to have addressed the important constitutional question of whether mature minors are entitled to obtain an abortion without parental notice. *See* Sup. Ct. R. 10(a).

First, the decision directly contradicts one of the central premises of Justice Powell's opinion in *Bellotti II*, 443 U.S. at 647: that mature minors have a right to obtain an abortion "without parental consultation or consent." This is a right recognized by every other court to address the issue and relied upon for nearly two decades by a generation of young women in this country. In departing from *Bellotti II*, the court below adopts and extends the opinion of Justice Kennedy in *Hodgson v. Minnesota*, 497 U.S. 417 (1990),

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[11] The portion of the opinion below addressing the Act's expeditiousness purports to apply the *Bellotti II* standards. *See* A-57. Accordingly, this portion of the opinion appears to govern both notice and consent statutes.

dissenting from this Court's invalidation of Minnesota's two-parent notice statute without judicial bypass. *See id.* at 491-97.[12]

Second, the court below concludes that requiring notice of an abortion to a non-abusive, non-absent parent cannot, *as a matter of law*, effectively delegate a veto power to the minor's parents or otherwise impose a substantial obstacle in the path of the minor's decision to end her pregnancy. Reaching this conclusion as a matter of law conflicts with this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), under which restrictions alleged to ensure that a woman's consent to an abortion is informed, but which are claimed to impose an undue burden, must be subject to particularized factual scrutiny. Thus, by reaching its holding as a matter of law, the Fourth Circuit has improperly replaced the undue burden standard of review established in *Casey* with a toothless rational basis standard that dips below the fact-based "reasonableness" test this Court employed in *Hodgson*.

Third, in addition to eviscerating the right of a mature minor to obtain an abortion independently, the decision of the court of appeals seeks to impose a new duty on every State to *ensure* the involvement of both parents into the private affairs of their mature daughters. This new duty extends beyond abortion into every "life-defining" decision, and could invalidate scores of state statutes guaranteeing minors the right to make such decisions independently of their parents. By creating enhanced parental rights, the court below effectively prohibits judges from authorizing abortions except in cases of abuse or neglect: other reasons for granting judicial bypass of notice would violate parents' rights.

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[12] While dissenting opinions by Justices may eventually become majority opinions, that transformation is a task for this Court, not for the lower federal courts.

Fourth, every other standing federal court decision conflicts with the decision below in its holding that a statute mandating parental notice of a minor's abortion decision need not contain a bypass mechanism satisfying this Court's plurality opinion in *Bellotti II*. The Fourth Circuit's decision also conflicts with the holdings of two other courts of appeals about the necessity of an explicit time frame for decision of a minor's bypass petition. *See* Sup. Ct. R. 10(a).

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S JURISPRUDENCE GOVERNING PARENTAL INVOLVEMENT STATUTES.

In *Bellotti II*, Justice Powell wrote that "a State [must] act with particular sensitivity when it legislates to foster parental involvement" in abortion because of "the unique nature of the abortion decision." 443 U.S. at 642. The Fourth Circuit's decision recklessly approves a statute that mandates parental involvement in the abortion decision of minors not only without sensitivity, but with disregard for the holdings and analysis employed by this Court.

A. The Decision Of The Court Below Is Incompatible With Justice Powell's Landmark Opinion In *Bellotti II*.

The decision of the court below is a direct attack on the holding and reasoning of this Court's "principal opinion" in *Bellotti II*, under which a minor mature enough to make the abortion decision herself has a right to obtain an abortion "without parental consultation and consent." *Id.*, 443 U.S. at 647 (plurality opinion). Only by reducing much of Justice Powell's opinion and reasoning in *Bellotti II* to *dicta*, *see* A-30 n.5, and by distorting subsequent opinions of this Court, was the court below able to reach the opposite result: that a minor mature enough to make the abortion decision on her own nevertheless may be compelled by the State to notify a

parent of her decision, regardless of the consequences to her. This conflict, reached without any evidence showing that parental notice is in any manner beneficial to the mature minor, is sufficient to justify summary reversal by this Court.

In *Bellotti II*, this Court invalidated a Massachusetts statute mandating that a minor seeking an abortion obtain the consent of her parents for the procedure. Four Justices joined the opinion of Justice Powell in that case, which holds that a statute requiring "a pregnant minor to obtain one or both parents' consent to an abortion" must also "provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 643 (footnote omitted). Justice Powell's opinion set forth the features that such an alternative procedure must have in order for a parental consent statute to meet constitutional muster: it must allow a minor to show "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44 (footnote omitted). Such a procedure must also "assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644. Although Justice Powell's opinion did not constitute the opinion of the Court, his opinion has repeatedly been used by the Court as the touchstone to evaluate the adequacy of judicial bypass procedures established by states in their parental consent statutes. *See, e.g.*, *Lambert v. Wicklund*, 117 S. Ct. 1169, 1171 (1997) (adopting Justice Powell's opinion as "[t]he Court's principal opinion" in *Bellotti II*); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 440-41 (1983) ("*Akron I*") (adopting Justice Powell's plurality opinion); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 491 (1983) (same).

Although *Bellotti II* addressed the validity of a parental *consent* statute that purported to contain a judicial bypass mechanism, the statute at issue had been construed by the Massachusetts Supreme Judicial Court to require *notice* to a minor's parents of any such judicial proceeding. *Id.* at 646. Justice Powell's opinion properly recognized that such notice to parents "would impose an *undue burden* upon the exercise by minors of the right to seek an abortion." *Id.* at 647 (emphasis added). This is because "many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Id.*

Accordingly, the Massachusetts statute was defective. In a constitutional statute, the minor "must have the opportunity -- if she so desires -- to go directly to a court without first consulting or notifying her parents," *id.*, for such notice could provide a parent with the opportunity to obstruct either access to court or the abortion itself. Once she avails herself of the bypass procedure, the court "must authorize [the mature minor] to act without parental consultation *or* consent," *id.* (emphasis added), because, having reached the courthouse, a court-imposed requirement of parental consultation could create an opportunity for a parent to obstruct the abortion even if the court authorized the procedure. Even the *immature* minor "is entitled to court authorization *without any parental involvement*," *id.* at 648 (emphasis added), if the abortion is in her best interests. The state court is, however, permitted to "deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby"; *"[b]ut this is the full extent to which parental involvement may be required."* *Id.* (emphasis added).

Bellotti II balanced the state's interest in a minor receiving parental assistance with her privacy rights. *Bellotti*

II permits a state to require parental involvement in the case of an *immature, non-best interests* minor. *See H.L. v. Matheson*, 450 U.S. 398 (1981). *Bellotti II* therefore requires a screening process that burdens the rights of mature minors, but ultimately preserves their right to obtain an abortion independently of their parents. In other words, *Bellotti II* holds that the balance between the state's interest and the minor's rights must be individualized so that mature minors retain full rights even while those rights are burdened by the necessity of going through a judicial bypass.

Bellotti II thus stands for the proposition that mature minors, like minors held to be emancipated by courts, can make their abortion decision without parental involvement, a principle flouted by the court below.[13] This is especially so because the "objective, though inevitably arbitrary" use of the age of majority to confer full-fledged constitutional rights must yield to the time-sensitive, "peculiar nature of the abortion decision," which "requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." *Id.* at 643 n.23. A minor mature enough to make the abortion decision independently is accordingly entitled to make that decision in sole consultation with her physician; she stands as an adult before the law. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) ("By showing that they are capable of mature, informed consideration, such [mature] minors establish that the State has no legitimate interest for imposing a restriction on their liberty interests that it could not impose on adult women."), *cert. denied*, 517 U.S. 1174 (1996).[14]

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[13] Under the Fourth Circuit's holding, a mature minor, paradoxically, has greater rights under a parental *consent* statute than under a parental *notice* statute. Under the former, she has a right to obtain an abortion without any parental involvement, under the clear holding of Justice Powell's opinion in *Bellotti II*.

[14] In *Casey*, this Court approved the "reasonable assumption that minors will benefit from consultation with their parents," but cautioned that

The Fourth Circuit directly attacks this reasoning in *Bellotti II*, suggesting instead that individualized assessment of maturity is really irrelevant to the ability to make the abortion decision independently, and that any minor found to mature would still benefit from an inquiry as to whether parental involvement is in her best interest. *See* A-46-47 ("Although the age of majority might be considered arbitrary, in the most important sense it is not."). This reasoning cannot be confined to the context of parental notice; the Fourth Circuit fails to explain why maturity exempts a minor from parental involvement under a *consent* statute, but not under a notice statute. The Fourth Circuit's reasoning would thus apply equally in the parental consent context and replace the two prong bypass of *Bellotti II* with a single inquiry: is parental involvement in the minor's best interest? -- thereby rendering the maturity prong of *Bellotti II* a nullity. Thus, the "maturity" inquiry demanded under *Bellotti II*, and accepted in every subsequent decision of this Court involving parental consent statutes, would become a meaningless exercise for the minor.

The only opinion of this Court that might be read to suggest that a parental notice statute does not require a judicial bypass is *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) ("*Akron II*"). There, the Court wrote that "although our cases have required bypass

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"[w]e cannot adopt a parallel assumption about adult women." 505 U.S. at 895. Because a finding of maturity transfers the minor into the class of adult women for purposes of the abortion decision, *Casey* prohibits precisely the assumptions about mature minors made by the Fourth Circuit. *See* A-46 ("even the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more informed, better considered, abortion choice"). Precisely these assumptions could be made about adult women at *any* age; a finding that the minor is mature enough to make the abortion decision on her own and render informed consent exempts her from such assumptions. Otherwise, a finding of "maturity" under the Act is a mere formalism, since it entitles the "mature" minor to no particular solicitude.

procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures." *Id.* at 510. The Court in *Akron II* thus left the question technically "open." *Id.* However, as the concurring opinion of Justice Stevens in *Akron II* explains, this Court has "squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional. Although it need not take the form of a *judicial* bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests." *Id.* at 522 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). *Akron II*, then, does not re-open the relevant question settled by *Bellotti II*: that a mature minor is entitled to obtain an abortion without parental consultation, and the State must protect this right in whatever statute it enacts. *Akron I* underscores this by rejecting a statute that required mandatory notice of a "bypass" mechanism for mature teenagers under 15 years of age. 462 U.S. at 441 n.31 ("the statute requires that the minor's parents be notified once a petition has been filed . . . , a requirement that in the case of a mature minor seeking an abortion would be unconstitutional.")

The court of appeals purports to find support for its departure from *Bellotti II* in the several opinions in *Hodgson*. But the tortured use of the opinions in *Hodgson* only confirms the conflict between this Court's jurisprudence and the decision below. *Hodgson*, properly read, contradicts the Fourth Circuit's opinion in several important respects.

First, a majority of the Court in *Hodgson*[15] described the opinion of Justice Powell in *Bellotti II* in terms that confirm the right of the mature minor to obtain an abortion without parental notice. The Court wrote that one of "the

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[15] Parts I, II, IV, and VII of the opinion of Justice Stevens in *Hodgson* are the opinion of the Court. *See* 497 U.S. at 422.

constitutional defects that Justice Powell identified in the [Massachusetts] statute" was "its failure to allow a minor who is found to be mature and fully competent to make the abortion decision *independently*." 497 U.S. at 453-54 (emphasis added). The Fourth Circuit's opinion in the instant case ignores *Hodgson's* re-affirmation of the Massachusetts statute's "constitutional defect." Thus, the Fourth Circuit opinion, which upholds a statute that fails to guarantee the ability of a mature minor to make her abortion decision "independently," is in conflict with *Hodgson*.

Second, the court below improperly construes Justice O'Connor's separate opinion in *Hodgson* to hold that a notice statute (one or two parent) is valid so long as it has an effective abuse and neglect exception and a way for minors to avoid notice to irresponsible parents. *See* A-28-29. But Justice O'Connor's opinion cannot be read to stand for this proposition.

In *Hodgson*, Minnesota argued that its statute required no "bypass" beyond that provided by its abuse and neglect exception. Justice O'Connor's opinion *rejected* this argument, finding that this exception could often result in notice to the parents. *See* 497 U.S. at 460. Justice O'Connor's opinion neither considers nor decides whether an abuse and neglect exception that did not provide notice to the minor's parents would constitute a sufficient bypass. Instead, Justice O'Connor appears to view the failure of Minnesota's abuse and neglect exception as further confirmation of the law's "unreasonableness." *See* 497 U.S. at 460. Moreover, like the Minnesota statute, the abuse and neglect exception in the Virginia law can also result in notice to the parents. The Fourth Circuit discounts this possibility by speculating that notice is far less likely to occur in Virginia than in Minnesota before the minor obtains an abortion. *See* A-51 n.8. Even if this were true, this rationale also erroneously disregards the potential for retribution after the abortion from an abusive parent. *See, e.g.*, Exhibits G &

H to Brief for Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125 & 88-1309) (news report and criminal information accusing Rocky Adams of murdering his daughter after she was impregnated by him and sought an abortion), *and* A-83 n.3.[16]

Third, the court below assumes, without citing any supporting evidence, as irrebuttable legislative fact that the state interests supporting parental notice of abortion are advanced rather than undermined by a statute that grants judges the discretion to compel parental notice for a mature minor. This breathtaking assumption of fact runs directly counter to the approach of the majority opinion of the Court in *Hodgson*, which scrutinized whether Minnesota's two-parent notice statute without bypass did not "reasonably further any legitimate state interest." 497 U.S. at 450 (opinion of the Court). There is *no* evidence in the record that any legitimate state interest is served by requiring a mature minor to notify a parent.[17]

Thus, the decision below conflicts directly with this Court's decisions in *Bellotti II* and *Hodgson*. Instead, it adopts the reasoning of the opinion of Justice Kennedy in *Hodgson*, which would have upheld Minnesota's two-parent notice statute without bypass.

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[16] Elsewhere in its opinion, the Fourth Circuit appears to recognize that a parent notified under the Act who does not actually speak with the minor before the abortion might later make his anti-abortion views "forcefully" known to his daughter. A-32. The potential for "forceful" retribution is certainly greater in cases where a minor has been a victim of past abuse and has unwittingly availed herself of the Act's defective abuse and neglect exception than it is in other cases.

[17] In this case, unlike *Hodgson*, there are no findings of fact by the district court, in part because the district court concluded that the Act was facially invalid under *Bellotti II*, and in part because of the preliminary stage of the proceedings in the district court.

B. The Decision Below Employs A Standard Of Review Lesser Than, And In Conflict With, That Applied By This Court.

Having embarked on a mission to undermine *Bellotti II*, and having misread *Hodgson* in its zeal to uphold the Act, the court below does not hesitate to reach its conclusions by announcing, as irrebuttable legislative facts, a range of assumptions. But this wholesale adoption of factual assumptions by the Fourth Circuit runs directly counter to this Court's recent "undue burden" jurisprudence, in which Members of the Court have repeatedly emphasized the crucial importance of careful factual analysis of restrictions claimed to enhance the quality of decisionmaking about abortion. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 888-894 (1992) (opinion of the Court) (examining factual evidence in detail to conclude that spousal notice requirement "is thus likely to prevent a significant number of women from obtaining an abortion"); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of injunction pending appeal) (stressing importance of particularized factual analysis).

As a result of its assumption of facts as a matter of law, the court below erroneously applies more deferential scrutiny to the Act than this Court applied to the Pennsylvania statute in *Casey*, and indeed applies scrutiny even more deferential than this Court applied in *Hodgson* to conclude that Minnesota's blanket two-parent notice statute "does not reasonably further any legitimate state interest." *Hodgson*, 497 U.S. at 450 (opinion of the Court). This reduction of the standard of review applicable to abortion restrictions on minors is in conflict with the decisions of this Court.

For example, the Fourth Circuit wrote, without factual support, that the imposition of parental notice "on the minor's unfettered abortion decision cannot be said to constitute a burden that is 'undue' under a Constitution that

jealously protects the sanctity of the family as the cornerstone of society." A-41-42. But determination of whether a burden is "undue" is a *factual* determination. *Casey*, 505 U.S. at 885-87 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (analyzing whether factual findings by district court demonstrated undue burden from mandatory 24-hour waiting period); *id.* at 888-93 (opinion of the Court) (analyzing whether factual findings by district court demonstrated undue burden from mandatory spousal notice requirement). By proceeding to the conclusion that mandatory parental notice for mature minors is not an undue burden without factual evidence, the court below applied the incorrect standard of review.

Even assuming, *arguendo*, that a standard of review lower than the "undue burden" standard applies to restrictions on minors' access to abortion, the court below applied the wrong standard. *Hodgson* establishes that even the question of whether a parental involvement requirement furthers legitimate state interests is a fact-intensive one. *See* 497 U.S. at 450-51 (opinion of the Court) (analyzing district court factual findings to conclude that statute was not reasonably related to legitimate state interest); *see also Turner v. Safley*, 482 U.S. 78, 98-99 (1987). In contrast, the court of appeals, rather than remanding to the district court for factual findings, improperly assumed that a mature minor will benefit from parental notice. *See, e.g.*, A-46 (if a parent is notified, the mature minor "will be better able to select the physician who will perform the abortion"; "will be better situated to provide her physician with the full medical history necessary to the professional treatment she will undergo"; and "with her parents' knowing involvement, her physical and emotional post-operative recovery will be eased").[18]

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[18] Factual evidence could, of course, contradict each of these assumptions. For example, the district court would evaluate whether a mature minor, as opposed to an immature one, is likely to be missing

Thus, while paying lip service to it, the court of appeals leaves no room for fact-finding under either prong of *Casey's* undue burden test: it invents a "purpose" for the Act's constriction of the rights of mature minors, and holds that notice is *per se* not an undue burden for all but abused and neglected minors. *See* A-40. The making of these factual assumptions is in direct conflict with the standard of review employed by this Court.

C. The Fourth Circuit Erroneously Converted The State's Legitimate Interest In Encouraging Parental Involvement In Abortion Into A Duty To Facilitate Parental Involvement In Every "Life Defining" Decision By Minors.

In *Bellotti II*, Justice Powell held that parental involvement legislation "furthers a constitutionally permissible end," *id.* at 640 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)), namely the "important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. In *Hodgson*, the Court characterized as "legitimate" the state's interest in "support[ing] the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." 497 U.S. at 450 (opinion of the Court).

The Fourth Circuit, however, raises this interest to new heights: "[A] notice statute serves the *compelling* state interest in securing inviolate the *right* of a mother and a father to rear their child as they see fit, and to participate fully in that child's life, as free from governmental

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medical history information relevant to a first-trimester abortion; or whether parents have better information about how to select an abortion provider than mature minors. The evidence could show that knowledge about one's relevant medical history and the ability to select an abortion provider are themselves benchmarks of maturity.

interference as constitutionally permissible." A-32 (emphasis added). Going yet further, the court of appeals writes that parents "are *obliged* to know, and they are *entitled* to know, the life defining decisions their children face." A-69 (emphasis in original). The court also describes as a "cardinal right" the authority of parents "to shape, as they deem appropriate, their children's lives, their beliefs, their values, their morals, their character." A-42.

The court below thus adopted the reasoning of the court of appeals in *Hodgson v. Minnesota*, 853 F.2d 1452, 1463 (8th Cir. 1988) (*en banc*). That court wrote: "[T]he district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement," a view rejected by this Court. Thus, these holdings by the court below conflict with the tempered view of this Court that renders any affirmative "right" of parents to know of their daughter's abortion decision derivative of the best interests of the minor. *See Hodgson*, 497 U.S. at 454 (opinion of the Court) (observing that the constitutional defects identified by Justice Powell in the statute at issue in *Bellotti II* "are predicated on the assumption that the justification for *any* rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child") (emphasis added).[19]

By unlinking the parental "right to know" from the minor's best interests, the Fourth Circuit's opinion invites constitutional challenges to numerous state statutes that guarantee to minors the right to make "life-defining" decisions in many arenas free of parental involvement. For example, under one Virginia statute, a minor is "deemed an adult for the purpose of consenting to": (1) diagnosis and

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[19] They also conflict with the Sixth Circuit's opinion in *Doe v. Irwin*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980), which holds that there is no affirmative parental "right to know" about a minor's decision to obtain contraception.

treatment of sexually transmitted diseases; (2) health care for birth control, pregnancy and family planning (except sterilization); (3) "outpatient care, treatment or rehabilitation for substance abuse"; and (4) "outpatient care, treatment or rehabilitation for mental illness or emotional disturbance." Va. Code Ann. § 54.1-2969(D)(1)-(4). Presumably, situations in which a minor seeks treatment for mental illness, pregnancy, or substance abuse are as much "moment[s] when . . . child is most in need of parent," A-43, as are the abortion decision, though Virginia guarantees minors the statutory right to be treated as adults in obtaining such treatment. Yet these very statutory provisions are of doubtful constitutionality under the Fourth Circuit's expansive view of parental rights.[20]

The Fourth Circuit's opinion authorizes "parental rights" challenges to every state statute, like Virginia's, that treats minors as adults for the purpose of consenting to "life-defining" treatments. This Court has never promoted parental rights as far as does the court below.[21] Accordingly,

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[20] The Fourth Circuit's creation of parental "cardinal rights" would also jeopardize the constitutionality of federal statutes designed to ensure the confidentiality of minors' access to family planning services under Title X of the Public Health Service Act, 42 U.S.C. § 300(a) *et seq.*, and under Title XIX of the Social Security Act. 42 U.S.C. § 1396d(a)(4)(C). *See, e.g., Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) ("Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurances, one of the primary purposes of Title X -- to make family planning services readily available to teenagers -- would be severely undermined"); *T.H. v. Jones*, 425 F. Supp. 873, 878 (D. Utah 1975) (legislative history of 1972 amendments to Title XIX "bears out Congress' concern that . . . Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis").

[21] Indeed, the court of appeals stops just short of suggesting parental involvement for *all* women, including adult women, based on its far-reaching view of parental rights:

> [I]t should go without saying, the parents' interest in the well-being, and continued care and support, of their minor daughter

this unprecedented elevation of parental rights merits review by this Court.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS.

A. Every Other Court Of Appeals Has Concluded That A Parental Notice Statute Must Contain A *Bellotti*-Type Bypass.

The decision of the court below is the first decision by a United States court of appeals to hold that a parental notice statute need not contain a bypass mechanism that meets the strictures set out in *Bellotti II*. To the extent that this Court views as "open" the question of whether a one-parent notice statute requires a *Bellotti*-type bypass, this conflict in the Circuits should be resolved in favor of the overwhelming majority of courts that have addressed the question.

The United States Courts of Appeals for the Sixth, Seventh, and Eighth Circuits have squarely held that parental notice statutes must include bypass mechanisms that satisfy Justice Powell's opinion in *Bellotti II*. *Miller*, 63 F.3d at 1460 ("parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass"); *Akron Ctr. for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988) ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"), *rev'd on other*

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likewise does not cease upon a judicial finding that their daughter is sufficiently mature to make the abortion decision herself. *As a factual matter, of course, that interest presumptively continues for life*; but, even as a matter of law, that interest continues *at least* until the child achieves majority.

A-46 (emphasis added). Moreover, many of the facts "assumed" to be true as a matter of law by the court of appeals, *see supra* at 21-22 and 16 n.14, could also justify legislation mandating that adult women involve their parents.

grounds sub nom. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990) (finding Ohio's bypass consistent with *Bellotti II*); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Women's Community Health Ctr. v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1977) (parental notice laws must have bypass).

Each of these courts has reached this result by properly recognizing that notice to a parent offers some parents the opportunity to veto the minor's abortion decision, or place a substantial obstacle in her path, as surely as if the parents were granted the power to consent *vel non*.[22] Thus, the Eighth Circuit in *Miller* wrote:

> Notifying the parent of the daughter's intentions 48 hours before the abortion can be performed gives the parent the opportunity to obstruct the daughter's choice, just as requiring consent gives parents the tool with which to do so. . . .
>
> The State can thus give parents a chance -- or even a tool -- to obstruct their immature, non-best-interests daughter's decision to have an abortion without violating the Constitution. *The State runs afoul of the Constitution, however, when it attempts to give that same*

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[22] This is why major medical organizations, including the American Academy of Pediatricians and the American College of Obstetricians & Gynecologists, while agreeing that parental consultation by the minor seeking an abortion is ideal, oppose mandatory notice as *not* in the best interest of minors. *See* Brief of the American College of Obstetricians & Gynecologists *et al.*, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (Nos. 88-805 & 88-1309).

> *power to parents of mature daughters capable of making their own informed choices.*

63 F.3d at 1459-60 (emphasis added). Similarly, the *Pearson* court wrote: "Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion, we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the constitutional sufficiency of Indiana's notification bypass procedures." 716 F.2d at 1132. *See also Slaby*, 854 F.2d at 861 ("we further conclude that [a parental notification requirement] cannot be supported in the case of a mature minor").

By contrast, the decision of the court below holds *as a matter of law* that a parental notice statute (whether it requires notice to one or both parents) "that excepts notice to the abusive, the irresponsible, the permanently absent, or the similarly disaffected parent" "vests with parents neither a veto in fact nor a veto in effect"; nor, in the view of the court below, does such a notice requirement "otherwise constitute a substantial obstacle to, or an undue burden on, the abortion decision." A-40. Not only is this holding unsupported by any evidence in the record,[23] it also defies common sense.

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[23] In *Casey*, this Court concluded, based on record evidence, that Pennsylvania's "spousal notice requirement enable[d] the husband to wield an effective veto over his wife's [abortion] decision," 505 U.S. at 897 (opinion of the Court), particularly for those women who would be reluctant to report prior abuse to the state, *id.* at 893, and those who "fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Id.* Like Pennsylvania's statute, the Act contains *no* exception for minors fearful of *reporting* abuse, and its abuse exception (which may itself result in notice, *see* A-50), does not provide protection from deterrents like withdrawal of financial support or physical confinement to the home. *See* Va. Code Ann. § 63.1-248.2. Thus, the Fourth Circuit's finding that

Surely a non-abusive, responsible parent can obstruct abortion as effectively as an abusive one. The decision below thus directly conflicts holdings of these three other courts of appeals.

Moreover, the decision below holds as a matter of law that a mature minor, absent a showing of past abuse or neglect, is not entitled to a judicial bypass. A-63 ("We have concluded today that the Supreme Court would not require a parental notice provision that satisfies *Hodgson* to also provide a maturity bypass"). Indeed, the decision below relegates the mature minor to the same position as the *immature* minor: neither is entitled to avoid parental notice except upon a showing of past abuse or neglect. This holding stands in direct conflict with the holding in *Miller* that the mature minor cannot be subjected to restrictions to which adult women are immune. *See* 63 F.3d at 1460. Indeed, because there is no magic age at which individuals become mature decision-makers, the decision of the court below would justify parental notice of abortion for *all* women -- all women, no matter their chronological age, could be *assumed* to benefit from consultation with their parents. *See* n.14 *supra*.

B. The Decision Of The Court Below Is In Conflict With The Decisions Of Other Courts Construing *Bellotti II*'s Expediency Requirement.

The decision of the court below as to the expeditiousness of the Act's judicial bypass procedure also conflicts with the holdings of the courts of appeals in *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), and *Glick v. McKay*, 937 F.2d 434 (9th Cir.

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the Act does not delegate a veto power in effect not only has no factual basis, but conflicts with *Casey's* factual analysis.

1991).[24] The court below held that the Act's bypass was sufficiently expeditious to meet the requirements of *Bellotti II*, even though the Act "does not expressly specify how quickly [the minor's bypass] petition must be *decided*." A-61 (emphasis in original). In *Glick*, the court observed that the Nevada parental notice statute before it -- like the Act approved by the court below -- did "not contain any time period within which the state district court must rule upon a minor's petition . . . " 937 F.2d at 440.[25] The court accordingly held that "the Nevada statute does not constitutionally satisfy the fourth *Bellotti* criterion and therefore does not suffice for a consent statute." *Id.* at 441. In *Causeway*, the Fifth Circuit likewise invalidated a bypass procedure in a parental consent statute that failed "to provide a specific time frame for deciding the merits of a minor's application." 109 F.3d at 1110. The court held that "[s]uch an open-ended bypass procedure has never been approved." *Id.* The court reached this holding even though the judicial bypass was designated as a "summary proceeding" in which the court was to render its decision "as soon as practicable" after the hearing. *See* 109 F.3d at 1110 (quoting La. Civil Code § 2595). "As soon as practicable," the court wrote, "is insufficient under *Bellotti II*." 109 F.3d at 1111.

In direct conflict with these holdings, the court below explicitly approves such an "open-ended" bypass procedure as consistent with *Bellotti II*, basing its conclusion on the

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[24] As the Fifth Circuit noted in *Causeway*, although this Court in *Lambert* "disapproved the analysis in *Glick*, in which the Ninth Circuit held unconstitutional a bypass procedure which allowed a minor to have an abortion if parental notification, and not the abortion itself, was not in the minor's best interest . . . [n]othing in *Lambert* affects *Glick's* holding regarding *Bellotti II*'s expediency requirement." *Causeway*, 109 F.3d at 1111 n.12.

[25] The *Glick* court concluded that a judicial bypass procedure in a parental notice statute must meet *Bellotti II*'s expediency requirement. 937 F.2d at 441-42.

"unmistakable implication" it drew from "guidance" issued by the Executive Secretary. *See* A-61. But "unmistakable implications" do not satisfy *Bellotti II*'s expediency requirement. *See Causeway*, 109 F.3d at 1111. This conflict about the meaning of *Bellotti II*'s expediency requirement subjects minors to the possibility of "open-ended" judicial bypass proceedings reigned in only by "unmistakable implications," and provides an additional basis for this court to grant review in this case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

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OCTOBER TERM, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Petitioners,

—v.—

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Volume 1 of 2

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Plaintiffs-Appellees,

v. No. 97-1853

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.

James C. Turk, District Judge.
(CA-97-43-C)

Argued: March 3, 1998

Decided: August 20, 1998

Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Vacated and remanded by published opinion. Judge Luttig wrote the opinion, in which Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, and Williams joined. Chief Judge Wilkinson wrote a concurring opinion. Judge Widener wrote a concurring opinion. Judge Michael wrote an opinion concurring in the judgment, in which Judges Murnaghan, Ervin, and Motz joined.

COUNSEL

ARGUED: William Henry Hurd, Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Simon Heller, THE CENTER FOR REPRODUCTIVE LAW & POLICY, New York, New York, for Appellees. **ON BRIEF:** Richard Cullen, Attorney General of Virginia, Claude A. Allen, Deputy Attorney General, Siran S. Faulders, Senior Assistant Attorney General, Garland L. Bigley, Assistant Attorney General, Alison P. Landry, Assistant Attorney General, Brian M. McCormick, Assistant Attorney General, Daniel J. Poynor, Assistant Attorney General, Rita R. Woltz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Karen A. Raschke, MACAULAY, LEE & POWELL, Richmond, Virginia, for Appellees.

OPINION

LUTTIG, Circuit Judge:

Following eighteen years of public debate among the citizens of the Commonwealth of Virginia, the General Assembly of the Commonwealth enacted, and the Governor of the Commonwealth signed into law, the state's Parental Notice Act, which requires that a minor who decides to have an abortion inform one of her parents twenty-four hours prior to performance of the procedure. Only hours before this law was to become effective, the federal district court for the Western District of Virginia enjoined enforcement of the Act by the Common- wealth. Upon extraordinary motion of Virginia's Attorney General, we immediately stayed the district court's injunction, and allowed the law to become effective in accordance with its terms.

We hold today that the Commonwealth's parental notice statute, as legislation that respects the fundamental interests of responsible parents in the rearing and in the educational, moral, and religious development of their children, without unduly burdening the fundamental abortion right, is facially constitutional under the Fourteenth Amendment. A contrary holding -- that the People of Virginia are forbidden by the Constitution of the United States from requiring that the responsible mother and father of a pregnant teenage daughter even be told of the life-defining decision their own daughter confronts -- we are convinced, would be a holding not of law, but of will, and thus would betray the trust upon which our very legitimacy as an institution depends.

I.

Virginia's Governor Allen signed into law the Commonwealth's Parental Notice Act, Va. Code § 16.1-241(V), on March 22, 1997. The Virginia General Assembly

had passed the measure a month earlier. By its terms, the Act was to become effective at 12:01 Tuesday morning, July 1, 1997.

As the title denotes, the Act is a parental notice statute, not a parental consent statute; it prohibits a physician from performing an abortion on an unemancipated minor unless, twenty-four hours in advance of the procedure, notice of the anticipated abortion is provided to one of the minor's parents, to a duly appointed legal guardian or custodian of the minor, or to one standing in loco parentis to the minor.

The Act expressly allows the performance of abortions without notice in circumstances in which the minor seeking the abortion has been the victim of parental abuse or neglect, and in circumstances in which either an abortion is immediately necessary to prevent the mother's death or there is insufficient time to permit notification without exposing the minor to serious health risk.

Although the Supreme Court has never held that a parental notification law must include a judicial bypass procedure in order to withstand constitutional challenge, the Parental Notice Act includes such a procedure. That procedure permits, if it does not require, authorization of an abortion without parental notification for a minor who shows that she is mature and capable of giving informed consent, and it requires such authorization for an immature minor, and at least the abused mature minor as well, as to whom it is determined that an abortion would be in her best interest.

The Act confers upon every minor who avails herself of the bypass procedure the right to participate in the court proceedings on her own behalf and to have counsel assist her throughout the proceedings. If the minor so requests, the court is obligated to appoint counsel for the purpose of assisting the young woman in the bypass proceedings.

The Act also provides that bypass proceedings, which are to be conducted before the Commonwealth's Juvenile and Domestic Relations District Court, "shall be confidential." And the statute further provides both that judicial bypass proceedings "shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor" and that bypass petitions "shall be heard as soon as practicable but in no event later than four days after the petition [seeking judicial authorization] is filed." Finally, the Act provides any minor for whom judicial bypass of notification is denied "an expedited confidential appeal to the circuit court."

Notwithstanding the Commonwealth's inclusion of a judicial bypass procedure in its Parental Notice Act, and of the other aforementioned safeguards, the Federal District Court for the Western District of Virginia, on the eve of the Act's effective date, preliminarily enjoined enforcement of the Act by the Commonwealth, holding that a substantial probability exists that the Act is facially unconstitutional. See District Court's Memorandum Op. at 7-8.

At 4:00 p.m. that afternoon, following issuance of the district court's order and the district court's subsequent denial of the Commonwealth's motion for stay of its decision, the Commonwealth filed a motion with a single Circuit Judge to stay the district court's injunction, and, at 7:45 p.m. that night, the judgment of the district court was stayed pending appeal. See Planned Parenthood v. Camblos, 116 F.3d 707 (4th Cir. 1997). The stay was thereafter affirmed by the en banc court, see Planned Parenthood v. Camblos, 125 F.3d 884 (4th Cir. 1997), and the full en banc court subsequently heard oral argument in the matter on March 3, 1998.

II.

In enjoining Virginia's Parental Notice Act, the district court relied entirely upon the Supreme Court's decision in Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), reasoning that, in that decision, the Supreme Court had set forth the constitutional standards applicable to state parental notification statutes, not merely parental consent statutes. Thus, said the district court, "[t]his court will . . . apply [Planned Parenthood v.] Casey, [505 U.S. 833 (1992)] and Bellotti II to the case at bar. Bellotti II requires that a judicial bypass satisfy four criteria." Memorandum Op. at 9 (footnote and citation omitted). And the court went on to examine the judicial bypass provisions of Virginia's parental notification statute under the criteria identified by the Court in Bellotti II as essential in order for a judicial bypass procedure within a parental consent statute to satisfy the Constitution.

Specifically, the district court observed that the Supreme Court in Bellotti II held that "[i]f [a pregnant minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent." Memorandum Op. at 10 (quoting Bellotti II, 443 U.S. at 647 (op. of Powell, J.) (emphasis added by district court)). The court then contrasted this requirement with the relevant provision of the Commonwealth's Act, which provides that, "[a]fter a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion." Id. (quoting Va. Code § 16.1-241 (V) (emphasis added by district court)). Concluding that the Virginia statute confers upon the judicial officer the absolute discretion whether to authorize a physician to perform an abortion without notice on a minor whom the court has determined is mature, the district court held that "[t]his

discretion violates the Bellotti II rule for 'mature' minors." Memorandum Op. at 11.

As discussed more fully below, although the Supreme Court held in Bellotti II that parental consent statutes must include specified judicial bypass procedures, including mandatory judicial bypass for mature minors, the Court did not address what, if any, such procedures are necessary in the context of a parental notice statute, like that enacted by the Commonwealth. And although the Supreme Court has subsequently upheld parental notice statutes which included Bellotti II-style bypass procedures, see Lambert v. Wicklund, 117 S. Ct. 1169 (1997) (per curiam); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (Akron II); Hodgson v. Minnesota, 497 U.S. 417 (1990), the Court has always carefully distinguished such statutes from parental consent statutes, explicitly reserving the question of what, if any, bypass procedures are required for parental notice statutes, see, e.g., Lambert, 117 S. Ct. at 1171-72; Akron II, 497 U.S. at 510-11; see discussion infra.

In concluding that the Supreme Court has held that a parental notification statute must meet the very same requirements that obtain for a parental consent statute, the district court seems to have confused the question of the standard of review applicable in facial challenges to abortion statutes and the question of the substantive requirements that a state's judicial bypass must satisfy if it is to meet constitutional standards. It appears that the district court conflated these two distinct questions because of its misreading of the Eighth Circuit's decision in Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995), as equating the two separate questions. Thus, for example, and most tellingly, the district court stated that,

> [i]n [Miller], the Eighth Circuit considered whether Bellotti II or [United States v.] Salerno, [481 U.S. 739 (1987),] applied to a parental notification statute. The court concluded that "the [Supreme] Court [in Casey, 505 U.S. at 833,] effectively overruled Salerno for facial challenges to abortion statutes" and went on to apply the Bellotti II standard. Significantly, the Supreme Court denied certiorari of Miller.

Memorandum Op. at 8 (citations omitted); see also id. (stating that plaintiffs argue that "Casey left intact the Bellotti v. Baird standard of review for judicial bypass provisions in parental consent statutes" (citations omitted)). The Eighth Circuit in Miller, however, did not reason or hold as the district court believed. That court first decided that the standard of review articulated in Casey , rather than that in Salerno, applies to facial challenges to abortion statutes and then, separately, concluded that a Bellotti II-type bypass procedure is required if a parental notification statute is to be upheld as constitutional. As that court framed the standard of review issue before it:

> The critical issue in this case is a threshold one: what is the standard for a challenge to the facial constitutionality of an abortion law? The State would have us apply the test set out in United States v. Salerno, 481 U.S. 739 (1987), under which "the challenger must establish that no set of circumstances exists under which the Act would be valid." Salerno, 481 U.S. at 745. Planned Parenthood, on the other hand, contends that the Supreme Court replaced the Salerno test in Casey, 112 S. Ct. 2791. Under Casey, it claims, an

> abortion law is unconstitutional on its face if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 112 S. Ct. at 2830.

Miller, 63 F.3d at 1456-57 (parallel citations omitted). Indeed, the Eighth Circuit did not even cite Bellotti II in its discussion of the appropriate standard of review. See Miller, 63 F.3d at 1456-58.

The district court compounded the error created by its misreading of Miller by misunderstanding the Supreme Court's decision in Lambert as "reinforc[ing]" its misreading of Miller. See Memorandum Op. at 9. Specifically, the district court reasoned that the Supreme Court affirmed in Lambert that Bellotti II applies in the context of parental notification statutes because the Court described the Ninth Circuit's error in that case merely as a "misapplication" of the Bellotti II standard, and not as an application of the "wrong" standard. Thus, said the district court:

> The Supreme Court reinforced the Eighth Circuit's Miller conclusion in Lambert v. Wicklund, 117 S. Ct. at 1169, when it reversed a Ninth Circuit decision which held the Montana Notice of Abortion Act unconstitutional under Glick v. McKay, 937 F.2d 434 (1991). In its opinion, the Court discussed the Ninth Circuit's application of the Bellotti II standard to the Montana act and concluded that the court had misapplied existing case law. Lambert, 117 S. Ct. at 1171. This discussion of the misapplication of the Bellotti II standard -- as opposed to the application of the wrong standard -- and the

> denial of certiorari in Miller leads this court to conclude that the Supreme Court intends for Casey and Bellotti II to be applied to parental notice bypass provisions. This court will therefore apply Casey and Bellotti II to the case at bar.

Memorandum Op. at 9 (emphases in original; footnote and citations omitted). Contrary to the district court's belief, the Court in Lambert said nothing whatsoever concerning the standard of review applicable to facial challenges to abortion regulation statutes, as one would expect given that Lambert was a summary reversal of the Ninth Circuit's decision, without even argument. Indeed, neither Salerno nor Casey is even cited in the Court's relatively brief per curiam opinion in Lambert.

In Lambert, the Supreme Court did, as the district court noted, discuss the Bellotti II criteria. But it did so only in demonstration that the judicial bypass provision at issue in Lambert was "substantively indistinguishable" from the bypass in the Ohio notice statute which the Court sustained in Akron II on the grounds that it satisfied the Bellotti II standards, and, therefore, that the Ninth Circuit's Lambert decision "simply [could not] be squared with [the Supreme Court's] decision in Akron II." 117 S. Ct. at 1171-72. The Court emphatically did not apply Bellotti II, as the district court surmised, having concluded that a parental notification statute must satisfy Bellotti II's requirements for a bypass procedure within a parental consent statute. In fact, in Lambert, the Court went out of its way to repeat both that it had not held in Akron II that a parental notification statute must include a bypass procedure and that it had held only that Ohio's bypass provision "a fortiori . . . satisfied any criteria that might be required for bypass provisions in parental notification statutes" because it "satisfied the four Bellotti

criteria required for bypass provisions in parental consent statutes." Lambert, 117 S. Ct. at 1171. The Court even chided the Ninth Circuit for invalidating Nevada's parental notification statute in Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), the decision as to which the Ninth Circuit concluded in Lambert that it was bound, "[d]espite the fact that Akron II involved a parental notification statute, and Bellotti involved a parental consent statute." Lambert, 117 S. Ct. at 1171. In doing so, the Court cited and quoted Justice Stevens' concurrence in the judgment in Bellotti II that Bellotti II did not determine "the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." Lambert, 117 S. Ct. at 1171 n.3 (citing and quoting Bellotti II, 443 U.S. at 654 n.1 (Stevens, J., concurring in the judgment)).

In the end, therefore, the district court correctly seemed to recognize that an issue has arisen as to whether, in Casey, the Supreme Court sub silentio overruled its decision in Salerno on the standard of review applicable to facial challenges to statutes regulating abortion, and therefore that a question exists as to whether the plaintiff in a facial challenge to an abortion statute must show that "no set of circumstances exists under which the Act would be valid," Salerno, 481 U.S. at 745, or instead must show only that "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." Casey, 505 U.S. at 895.[1] The district court erred,

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[1] See also Janklow v. Planned Parenthood, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting the denial of certiorari) ("Salerno's rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context."); id. at 1585 (Scalia, J., dissenting from denial of certiorari) (noting that the Court has "sent mixed signals on the question," but affirming his belief that the Court in Casey did not intend to change the Salerno standard); Fargo Women's Health Organization v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of application for stay and injunction pending appeal) ("In striking down

however, in reasoning from its conclusion that the Eighth Circuit was correct in Miller that Casey overruled Salerno, that Bellotti II perforce establishes the proper standard of review for facial challenges to abortion regulation statutes and directly controls the inquiry as to the constitutionality of judicial bypass procedures within parental notification (and not just parental consent) statutes. It is plain not only that Bellotti II does neither, but also that the scope of the substantive holding of the Court in that decision will be unaffected by the final resolution of the question of whether the standard of review is that in Salerno or Casey. That is, regardless of the standard of review for facial challenges finally adopted, the Court held in Bellotti II, as we discuss below, only that a parental consent statute must include a judicial bypass procedure, and only established the procedures necessary for a consent statute.

Accordingly, the conclusion of law on which the district court's injunction to the Commonwealth rested, namely, that a parental notification statute must include a judicial bypass procedure that satisfies Bellotti II's requirements governing bypass procedures in parental consent statutes in order to be constitutional, was simply in error.

Pennsylvania's spousal-notice provision [in Casey], we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" (emphasis in original) (citation omitted)). Compare Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994), with Barnes v. Moore, 970 F.2d 12, 14 & n.2 (5th Cir. 1992). Because we conclude today that the Commonwealth's parental notice statute is facially constitutional under either the Salerno or the Casey standard, we need not, and do not, decide which of these two standards applies in facial challenges to abortion statutes.

III.

We ordinarily review a district court's ruling on a preliminary injunction only for abuse of discretion, that is, only in order to determine "whether the trial court abused its discretion in finding the presence or absence of irreparable harm and a probability that the plaintiffs would succeed on the merits," Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 755 (1986). Cf. University of Texas v. Camenisch , 451 U.S. 390, 395 (1981) (stating that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits" (emphasis added)); Alabama v. United States, 279 U.S. 229, 231 (1929) (similar). However, it is only as a prudential matter that we normally so circumscribe our review. In other words, this practice is "a rule of orderly judicial administration," Thornburgh, 476 U.S. at 757, and not an "inflexible" "limit on[our] judicial power," id. at 756- 57. Where a district court's decision "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance," id. at 757, we may, even on appeal from the entry of a preliminary injunction, proceed to the merits underlying the district court's judgment. For, in such cases, "[t]he customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." Id. (quoting American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 290 (3d Cir. 1984)); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (finding, despite the early stage of the litigation, that the case was ripe for mer- its review on appeal from stay of preliminary injunction).

Appellate adjudication of the underlying legal merits, on an appeal from the issuance of a preliminary injunction, is most clearly justified where not only does the injunction rest entirely upon a pure question of law, but it is plain that the

plaintiff cannot prevail as a matter of the governing law. When this is apparent to the court of appeals, a defendant is, as the Supreme Court has observed for more than a century, entitled both to immediate relief and to relief from the expense of further litigation. See, e.g., Thornburgh, 476 U.S. at 756 (citing Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897)); Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940); North Carolina Railroad Co. v. Story, 268 U.S. 288, 292 (1925) ("By the ordinary practice in equity as administered in England and this country, an appellate court has the power on appeal from a temporary or interlocutory order or decree to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit."); City of Denver v. New York Trust Co., 229 U.S. 123, 136 (1913) (explaining that the appellate power to review preliminary injunctions "is not confined to the act of granting the injunctions, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits" to the underlying claim, "and, if so, to directing a final decree dismissing it"); Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U.S. 519, 523 (1912) ("For, while at one time there was some difference in the rulings on that subject, it was finally settled by Smith v. Vulcan Iron Works, 165 U.S. 518, that, on appeal from a mere interlocutory order, the circuit court of appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit." (parallel citations omitted)).

These principles confirm the appropriateness of our proceeding to the underlying merits in this case. Here, the district court's injunction rests entirely upon that court's holding, as a matter of pure law, that a parental notice statute must include a judicial bypass in order to be constitutional and that that bypass must be identical to that required in order to

sustain a parental consent statute. And the district court fundamentally erred in its resolution of these questions.

Furthermore, the facts necessary to resolve these issues are undisputed, as even the plaintiffs-appellees correctly conceded at argument. Consequently, additional proceedings in the district court would serve no purpose whatsoever. While the parties dispute the precise contours of the judicial bypass included within the Commonwealth's parental notice statute (in particular, the meaning of the maturity bypass and the scope and efficacy of its requirements for confidentiality and expeditiousness), these disputes turn upon disagreements as to the proper interpretation of the statute, and secondarily upon predictions as to how the statute will actually operate in practice -- disagreements resolvable ultimately, not through determinations of fact, but rather only through determinations of, and predictions as to, state law. Because the appellate court does not defer to the trial court on interpretations of state law, see Salve Regina College v. Russell, 499 U.S. 225, 231 (1991), and the parties have already extensively briefed, both before the district court and this court, their respective predictions as to how the statute will actually be applied, further proceedings in the district court would obviously aid neither enterprise.

Recognizing that this dispute is ripe for consideration on the merits, the parties themselves agreed at oral argument that further proceedings in the district court are not necessary and that resolution of the merits of the dispute by this court would be appropriate. Therefore, rather than extend this litigation -- which is plainly ripe for final adjudication, implicates fundamental constitutional rights as determined by the Supreme Court, and has already been pending for over a year -- we proceed to the merits of plaintiffs' contention that Virginia's Parental Notice Act, on its face, violates the Fourteenth Amendment rights of minor women in the Commonwealth who choose to have abortions.

IV.

The Supreme Court held in Roe v. Wade, 410 U.S. 113 (1973), that a woman has a fundamental liberty interest in the decision whether to carry a pregnancy to term, and, in Planned Parenthood v. Casey, the Court reaffirmed that a woman has the "right 'to be free from unwarranted governmental intrusion'" in making the abortion decision, 505 U.S. at 875 (joint op. of O'Connor, Kennedy, and Souter, JJ.) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). In accordance with its recognition of this fundamental liberty interest, the Court has consistently held that the state may not permit another to exercise, in fact or in effect, an absolute, and therefore potentially arbitrary, veto over a woman's -- even a minor woman's -- decision whether to terminate her pregnancy.

Since Roe, the Court has reviewed both parental consent and parental notice statutes challenged on the grounds that they impermissibly permitted third-party veto of the abortion decision, invalidating several parental consent statutes on the grounds that they did effectively permit such veto of the abortion decisions of mature minors and minors for whom an abortion was in their best interest. The Court first addressed the constitutionality of a parental consent statute in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Because it conferred on the parent "an absolute, and possibly arbitrary, veto over the decision" of the minor and her doctor to terminate the minor's pregnancy, the Court struck down a "blanket" parental consent provision that prohibited all minors under the age of eighteen from obtaining an abortion without a parent's consent.[2] Id. at 74.

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[2] The Supreme Court also invalidated in Danforth a blanket provision requiring married women to obtain the consent of their husbands before obtaining abortions, because that requirement afforded husbands an

Three years later, in Bellotti II, the Court considered a parental consent statute that required a minor to obtain the consent of both of her parents or of a court before she could have an abortion. Again expressing concern over the possibility of an impermissible, absolute parental veto over the minor's abortion decision, the principal opinion of the Court held that,

> if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.

443 U.S. at 643 (op. of Powell, J.) (footnote omitted). The principal opinion defined the constitutional requirements for that alternative, or bypass, procedure as follows:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity

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absolute veto -- "exercisable for any reason whatsoever or for no reason at all" -- over their wives' abortion decisions. Id. at 71.

> for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in Danforth.

Bellotti II, 443 U.S. at 643-44 (op. of Powell, J.) (footnote omitted). It then went on to invalidate the Massachusetts consent statute in question because it permitted the court to exercise an absolute veto over the abortion decision of a minor whom the court determined to be "mature and fully competent to make th[e] decision independently," id. at 651, a discretion the first of the four Bellotti II criteria forbids. See id. (op. of Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.); id. at 653-56 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment) (concluding that the statute was unconstitutional because it subjected the abortion decision of every minor -- "no matter how mature" -- to "an absolute third-party veto" by either a parent or a judge).[3]

Although the Court invalidated Massachusetts' two-parent consent statute for the reasons stated, a majority of the Court expressed that, because of the value of responsible parental involvement in the minor's abortion decision, it would have upheld the state's two-parent consent statute if that statute had included a bypass that satisfied the criteria outlined in the principal opinion:

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[3] The Court confirmed the necessity of an adequate bypass procedure to parental consent requirements in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) ("Akron I") (overruled in part by Casey, 505 U.S. at 870, 882-85), when it struck down an Ohio parental consent statute that made no provision for a minor to make an individualized showing that she was mature enough to make her own decision, see id. at 440-41.

> We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest-- one normally supportive -- in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity.

Id. at 649 (op. of Powell, J.); see id . at 643-44; id. at 656-57 (White, J., dissenting) (noting his continuing dissent from the holding of Danforth that a state cannot require a minor to obtain the consent of her parents before undergoing an abortion). And, in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), the Court did sustain a one-parent consent statute that included a judicial bypass that allowed the minor to obtain an abortion without consent if she proved that she was mature enough to make her own decision or that the abortion was otherwise in her best interests. See id. at 491-93. The Court similarly upheld a one-parent consent statute in Casey that allowed a bypass of consent if the minor could demonstrate to the court that she "[wa]s mature and capable of giving informed consent and ha[d] in fact given her informed consent, or that an abortion would be in her best interests." 505 U.S. at 899 (joint op.); id. at 970- 71 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part) (upholding the parental consent provision).

Thus, although the Supreme Court has held that states may permissibly condition a minor's abortion even on parental consent to the procedure, it has required that parental consent statutes include Bellotti II judicial bypasses in order to ensure that the minor's decision is not subject to an absolute and arbitrary third-party veto. See Casey, 505 U.S. at 899 (joint op.) ("reaffirm[ing] . . . that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure").[4]

In contrast to its assessment of parental consent statutes, the Court has consistently recognized that the same potential for absolute veto over the abortion decision that inheres in a parental consent statute does not inhere in a parental notice statute, and therefore that notice statutes are fundamentally different from -- and less burdensome than -- consent statutes. As Justice Kennedy stated for four Members of the Court in Hodgson,

> [t]he difference between notice and consent [requirements] was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her

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[4] In so holding, the joint opinion in Casey explicitly distinguished parental notice and consent requirements from spousal notice requirements, which the Court invalidated as unduly burdensome. See, e.g., Casey, 505 U.S. at 895 (joint op.) ("[Parental notice and consent requirements], and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women."); id. at 898 ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children.").

> from obtaining an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental," and as one "substantially modify[ing] the federal constitutional challenge."

497 U.S. at 496 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part) (quoting Bellotti v. Baird, 428 U.S. 132, 145, 148 (1976) (Bellotti I)). And Justices Stevens and O'Connor have likewise noted that,

> [a]lthough the Court has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over [the abortion] decision, it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent.

Hodgson, 497 U.S. at 445 (op. of Stevens, J., joined by O'Connor, J.) (citation omitted); compare Akron II, 497 U.S. at 511 (majority) (citing H.L. v. Matheson, 450 U.S. 398, 411 n.17 (1981), for observation that "notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision"), with id. at 526 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) ("I conclude . . . [that] a parental-notice statute is tantamount to a parental-consent statute. As a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute.").

The Court has addressed the constitutionality of parental notice provisions in four cases. In the first, H.L. v. Matheson, 450 U.S. 398 (1981), it held that a state can, without providing any bypass procedure at all, constitutionally require notice to the parents of an unemancipated minor who has "made no claim or showing as to her maturity or as to her relations with her parents." Id. at 407. The Court explained that even if "the requirement of notice to parents [might] inhibit some minors from seeking abortions," id. at 413, the requirement extended to "neither parents nor judges a veto power over the minor's abortion decision," id. at 411 (footnote omitted), and therefore was constitutionally permissible:

> Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor.

Id. at 409 (footnotes omitted).

Since Matheson, the Court has twice more upheld parental notice statutes. In each of these instances, the statute included the Bellotti II bypass procedures required for consent statutes, and the Court simply sustained the statutes on the grounds that a notice statute that satisfies the requirements for a consent statute necessarily satisfies any requirements that might exist for a mere notice statute. In Akron II, the Court sustained Ohio's single-parent notification statute, which included a judicial bypass that met the Bellotti II consent bypass requirements. Akron II, 497 U.S. at 511-15. And most recently, in Lambert, the Court summarily reversed a Ninth Circuit decision which invalidated a Montana one-parent

notice provision that included a Bellotti II bypass. Lambert, 117 S. Ct. at 1172; see discussion supra.

Indeed, in the twenty-five years since Roe v. Wade, the Supreme Court has invalidated only one parental notice provision -- the Minnesota two-parent notification provision at issue in Hodgson -- and that was on the narrow ground that the statute failed to provide adequate exceptions to notice in circumstances where a parent was abusive or had not assumed the responsibilities of parenthood.

The Court in Hodgson was so fractured as to render its opinions collectively all but impenetrable, with five different Justices filing opinions variously concurring and dissenting in other opinions and parts of other opinions, prompting Justice Scalia to canvass thus the Court's action in Hodgson (and in Akron II, decided the same day):

> One Justice holds that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass; four Justices would hold that two-parent notification is constitutional with or without bypass; four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four apply two different standards; six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons; and three Justices would hold that one-parent notification with bypass is unconstitutional.

Hodgson, 497 U.S. at 479-80 (citations omitted) (Scalia, J., concurring in the judgment in part and dissenting in part). But at the end of the day, one majority of the Court struck down

the state's two-parent notification provision without any bypass, see id. at 455 (op. of Stevens, J., for the Court), and a different majority sustained the statute with a Bellotti II bypass, which became operative in the event of the notification provision's invalidation, see Hodgson, 497 U.S. at 461 (O'Connor, J, concurring in part and concurring in the judgment in part); id. at 496 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part).

The specific reasoning of the individual Justices was as follows.

Four Justices, it is plain, would have upheld Minnesota's two-parent notice statute without any judicial bypass at all, reasoning that it is "permissible for a State to legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it." See id. at 485, 489-497 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in the judgment in part and dissenting in part).

Four other Members of the Court joined in an opinion written by Justice Stevens that could fairly be understood as holding that all two-parent notice statutes are per se unconstitutional because (with respect to the functioning family) they either "fail to serve any state interest" at all or fail to serve any "legitimate interest," id. at 450 (op. of Stevens, J., for the Court), and because (with respect to the dysfunctional family) they actually "disserve[ ] the state interest in protecting and assisting the minor" by "prov[ing] positively harmful to the minor and her family." Id. Justice Stevens' opinion notes that the state defended the statute on the basis of its interest in having the minor make the abortion decision "only after consultation with both parents who should naturally be concerned with the child's welfare" and "in protecting the independent right of the parents 'to determine

and strive for what they believe to be best for their children,'" id. at 451-52 (citation omitted), and then states, without qualification, that "[n]either of these reasons can justify the two-parent notification requirement," id. at 452. Then, after surveying statutes nationwide "governing the health, welfare, and education of children" that authorized a minor to act with notice to or with the consent of a single parent or guardian, and declaring the Minnesota statute an "oddity" by comparison, id. at 454, the opinion concludes:

> These statutes provide testimony to the unreasonableness of the Minnesota two-parent notification requirement and to the ease with which the State can adopt less burdensome means to protect the minor's welfare. We therefore hold that this requirement violates the Constitution.

Id. at 455 (citations omitted); see also id. at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Today, the Court holds that a statute requiring a minor to notify both parents that she plans to have an abortion is not a permissible means of furthering the [state's interest in encouraging a minor to seek the advice of her parents when making the abortion decision.]").

It is apparent, however, that, although Justice O'Connor provided the fifth vote for the majority that invalidated the Minnesota notice statute without a bypass, she did not subscribe to the precise reasoning in Justice Stevens' opinion. In her separate opinion in which she sets forth her own reasoning for invalidating Minnesota's two-parent notice statute, Justice O'Connor contrasts the Minnesota statute with the statute in Arkansas, which, she noted, provided for exceptions to its two-parent notice requirement that would permit notice bypass in instances of abuse and permanently

absent parents. See id. at 459-60 ("Subdivision 2 is the most stringent notification statute in the country. The only other State that defines the generic term 'parents' as 'both parents' is Arkansas, and that statute provides for numerous exceptions to the two-parent notification requirement and permits bypassing notification where notification would not be in the best interests of the minor." (citations omitted)). She then identifies the specific flaws in the statute that prompted her vote to strike down the statute as first, that its exception to notification for abused or neglected minors was "less than effectual" because "in reality, [it was] a means of notifying the parents," and, second, that the statute required two-parent notice when "only half of the minors in the State of Minnesota reside with both biological parents" and "[a] third live with only one parent." Id. Justice O'Connor thus makes clear that she struck down the statute, not because a state may never require notice to both a mother and a father, but, rather, because of the "broad sweep" of Minnesota's statute in particular, and "its failure to serve the purposes asserted by the State in too many cases." Id. at 460 (O'Connor, J., concurring in part and concurring in the judgment in part); see also id. at 459 ("I agree with JUSTICE STEVENS that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes created by subdivision 2 . . . ." (emphasis added)); id. at 479 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that he understood Justice O'Connor's opinion as holding "that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass" (emphasis added)).

That this was Justice O'Connor's understanding also of Justice Stevens' opinion, and thus was the narrow grounds upon which Justice Stevens' opinion rests, is conclusively confirmed by the fact that Justice O'Connor ultimately voted to sustain the Minnesota statute, with a judicial bypass. Id. at 461 (O'Connor, J., concurring in part and concurring in the

judgment in part). Obviously, if Justice O'Connor had believed that a state never has a legitimate interest in notice to both parents -- as Justice Stevens' opinion could be read to hold, and as, from his opinion in dissent, he appears to believe, see id. at 455-58 (Stevens, J., dissenting) -- she could not have sustained the provision with the bypass. In fact, the Court as a whole could not have upheld the Minnesota statute with the bypass, as it did, if five Justices had actually held that the state has no interest whatsoever in requiring that two parents be notified of their minor daughter's abortion decision. See id. at 461 (O'Connor, J., concurring in part and concurring in the judgment in part) (upholding the two-parent notice statute with bypass); id. at 497 (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in part and dissenting in part). As Justice Stevens noted in his dissent, a bypass cannot save a statute that is not reasonably related to any legitimate state interest in the first place. Id. at 457.

Therefore, it is evident that the Court in Hodgson did not hold that a two-parent notice requirement is per se unconstitutional; in fact, a majority of the Court held that a two-parent notice requirement generally furthers important and legitimate state interests. It is equally evident that the Court did not hold that a parental notification statute -- even a two-parent statute -- must include a judicial bypass in order to be constitutional. As noted, Justices Kennedy, White, Rehnquist and Scalia would have sustained the statute even without the bypass and actually did (together with Justice O'Connor) sustain the statute with the bypass. Justice O'Connor voted to invalidate the statute without the bypass, but only because it failed adequately to provide exceptions to notice for the abusive parent[5] and the parent who failed to

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[5] Although the Minnesota statute purported to include an exception to notice for abused minors, if the minor availed herself of the exception by declaring herself abused, the abuse, by law, had to be reported immediately to state authorities. The resulting investigation would result in notice to the

accept the responsibilities of parenthood. And she ultimately voted to uphold the statute, not because all two-parent notice statutes require a Bellotti II bypass and the modified Minnesota statute contained such a bypass, but, rather, because the statute's Bellotti II bypass necessarily cured the defects she identified in Minnesota's notice statute. See Akron II, 497 U.S. at 511 ("As we hold today in Hodgson v. Minnesota, it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute." (citations omitted; emphasis added)).

That the Court did not strike down the statute because it lacked a judicial bypass, but, rather, because of the overbreadth of the statute's notice requirement, even appears upon a careful reading of Justice Stevens' opinion. As that opinion recites its holding at the beginning of its analysis: "It is equally clear that the requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest." Hodgson, 497 U.S. at 450 (op. of Stevens, J., for the Court) (first emphasis in original; second emphasis added); see also id. at 424-25 ("No exception [to the notice requirement] is made for a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother."); id. at 445-46 (noting that biological parents' "interest in controlling the education and upbringing of their children" rises to "the level of a liberty interest" only "through the assumption of personal, financial, or custodial responsibility").

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parent. Id. at 426 n.7 (op. of Stevens, J., for the Court); see also id. at 460 (O'Connor, J., concurring in part and concurring in the judgment in part) ("The Minnesota exception to notification for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents.").

Indeed, the very same day that Hodgson was decided, the Court in Akron II, avoiding the notice bypass issue in the same way that it had in Hodgson, expressly confirmed, in an opinion in which Justice O'Connor herself joined, that it had yet to decide whether the Constitution requires that a parental notice statute include a judicial bypass:

> [A]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. See Matheson, [450 U.S. at 413 & n.25] (upholding a notice statute without a bypass procedure as applied to immature dependent minors). We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [the Ohio parental notice statute's] bypass procedure meets the requirements identified for parental consent statutes . . . .

Akron II, 497 U.S. at 510; see also Lambert, 117 S. Ct. at 1171 (reaffirming that, in Akron II (and therefore presumably in Hodgson as well), the Court had "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional"). And the question of whether a bypass is necessary within a parental notice (as opposed to consent) statute still remains open today.[6]

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[6] To the extent that the principal opinion in Bellotti II suggests that some bypass to parental notice may be required, see, e.g., 443 U.S. at 646-48 (op. of Powell, J.), that suggestion is dicta which failed to command a majority of the Court. In fact, Justice Stevens, writing for himself and the three other Justices whose concurrence in the judgment was necessary to invalidate the parental consent provision at issue in Bellotti, explicitly stated that "this case [does not] determin[e] the constitutionality of a

V.

Turning now to this question for the first time in our Circuit, we conclude, based upon the substantial authority from the Court emphasizing the fundamental differences between consent and notice statutes that the Constitution does not require for "mere notice" statutes the full panoply of safeguards required by the Court in Bellotti II for parental consent statutes. In particular, we conclude that a parental notice statute that includes the exceptions to notice identified in Hodgson is, without more, facially constitutional. That is,

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statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." Id. at 654 n.1 (Stevens, J., concurring in the judgment). The Court in Lambert even relied upon this statement by Justice Stevens in support of its conclusion that, in Bellotti II, it had addressed only a parental consent statute, and in affirming that whether parental notice statutes must include some sort of bypass remains an open question. See Lambert, 117 S. Ct. at 1171 & n.3; see also Matheson, 450 U.S. at 411 n.17 ("In Bellotti II . . . we expressly declined to equate notice requirements with consent requirements.").

Contrary to Justice Stevens' suggestion in concurrence in Akron II, see 497 U.S. at 522-23 (Stevens, J., concurring in part and concurring in the judgment), the Court in Akron I also did not hold that some bypass to notice -- judicial or other -- is required. The Court in Akron I invalidated the parental consent statute there at issue because it did not believe that the statute was "reasonably susceptible of being construed to create 'an opportunity for case-by-case evaluations of the maturity of pregnant minors,'" Akron I, 462 U.S. at 441 (quoting Bellotti II, 443 U.S. at 643 n.23 (op. of Powell, J.)). The Court opined in a footnote that even if the general Ohio statute governing juvenile proceedings could be construed to create procedures allowing a minor to make an individualized showing of maturity, those procedures would nonetheless be inadequate to cure the constitutional infirmity of the consent requirement because, under state law, the minor's parents would receive notice if the minor availed herself of the procedures. See id. at 441 n.31. This footnote suggestion was obviously dicta to the Court's holding that the statute did not create a maturity bypass to its consent requirement. Cf. id. at 469 n.12 (O'Connor, J., dissenting) ("In my view, no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional.").

provided that a parental notice statute does not condition the minor's access to abortion upon notice to abusive or neglectful parents, absent parents who have not assumed their parental responsibilities, or parents with similar relationships to their daughters, we do not believe that more is required in order to withstand a facial challenge to its constitutionality. For a parental notice statute -- unlike either a spousal notice or a blanket parental consent statute -- has neither "the purpose [n]or effect of placing a substantial obstacle in the path of a woman seeking an abortion," Casey, 505 U.S. at 877 (joint op.), and therefore cannot reasonably be said to unduly burden the minor's abortion right, see id.

A.

1.

A parental notice statute -- one-parent or two-parent -- that excepts from its requirements notice to the abusive or neglectful parent, or the parent who has not assumed responsibility for the minor, indisputably furthers legitimate and important state interests.

Such a notice statute serves the compelling state interest in securing inviolate the right of a mother and a father to rear their child as they see fit, and to participate fully in that child's life, as free from governmental interference as constitutionally permissible. It is a fundamental premise of our society that "[t]he child is not the mere creature of the State" and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for," the challenges and decisions of life. Bellotti II, 443 U.S. at 637 (op. of Powell, J.); see also Hodgson, 497 U.S. at 445 (op. of Stevens, J.) (stating that as "'a counterpart of the responsibilities they have assumed[,]'" "[p]arents have an interest in controlling the education and upbringing of their children") (quoting Lehr v. Robertson, 463 U.S. 248, 257

(1983)). As the Court observed in Matheson, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 450 U.S. at 410 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)); see also Bellotti II, 443 U.S. at 638 (op. of Powell, J.) ("[D]eeply rooted in our Nation's history and tradition[ ] is the belief that the parental role implies a substantial measure of authority over one's children."). And as Justice Kennedy has stated,

> [t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Hodgson, 497 U.S. at 484 (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal quotation and citation omitted).

Indeed, the parental right to shape and direct the life of one's child during that child's minority is itself a fundamental liberty interest protected by the Constitution:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include

> preparation for obligations the state can neither supply nor hinder.

Id. at 447 (op. of Stevens, J.) (internal quotations and citations omitted); see also Bellotti II, 443 U.S. at 639 n.18 (op. of Powell, J.) ("The Court's opinions [in] Pierce, Yoder, Prince and Ginsburg . . . all have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State."); Matheson, 450 U.S. at 410 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." (citations omitted)); see also Hodgson, 497 U.S. at 484 (Kennedy, J., concurring in the judgment in part and dissenting in part). And this parental liberty interest is, the Court has recognized, fully consistent with the minor's liberty interest in the abortion decision. See, e.g., id. at 444 n.31 (op. of Stevens, J.) ("Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.") (quoting Bellotti II, 443 U.S. at 638 (op. of Powell, J.)). In fact, this fundamental parental interest, derivatively asserted by the state on behalf of the parent, is at its zenith when the decision as to which parental involvement is urged is one -- like the abortion decision -- with profound and enduring consequences not merely for the physical well-being of the child, but for the child's spiritual, moral, and emotional development. See Bellotti II, 443 U.S. at 637-38, 640 (op. of Powell, J.); see also Danforth, 428 U.S. at 103 (Stevens, J., concurring in part and dissenting in part) ("[E]ven if [the abortion decision] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative"); Casey, 505 U.S. at 899-900 (joint op.) (explaining that waiting period required by

informed parental consent provision legitimately provided "the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family"); Hodgson, 497 U.S. at 480 (Kennedy, J., concurring in the judgment in part, and dissenting in part) (describing abortion decision as a "grave" one, and observing that "a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support") (quoting Bellotti II, 443 U.S. at 641 (opinion of Powell, J.)).

Because parents do have a fundamental liberty interest in the parent to child relationship, see id. at 484 -- an interest that is not only compatible with, but also supportive of, the minor's liberty interest in her pregnancy -- the state plainly furthers a legitimate constitutional end when it affirmatively encourages continued parental involvement with the minor child by requiring that mothers and fathers know of the most profound choices their children confront, see id.

As importantly, the requirement that responsible parents be apprised of their minor daughter's decision to obtain an abortion furthers the state's legitimate interest in ensuring that the minor's abortion decision is fully informed. That the states may constitutionally enact reasonable regulations to ensure informed consent, even for adult women, is beyond question. As the Court observed in Casey:

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. . . . Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are

> permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

505 U.S. at 877 (joint op.) (emphasis added). It was precisely because of the importance of this state interest that the Court upheld, as not "unduly burdensome" on the abortion right, Pennsylvania's informed consent provision, which permitted women to obtain abortions only after being given truthful and nonmisleading information regarding the nature of the abortion procedure. The requirement that women contemplating an abortion be provided such information, reasoned the Court, merely "facilitate[d] the wise exercise of th[e] [abortion] right." Id. at 887.

Of course, the state has an even stronger interest in ensuring that the consent of minors is informed because minors are more likely than adults to proceed uninformed. See, e.g., id. at 899 (explaining that informed consent provisions "have particular force with respect to minors"). As the Court has often recognized, "at the same time [that the teenager] is much more apt to be motivated by mere emotion or peer pressure than is an adult," she is, due to her "[i]nexperience, less education, and less intelligence . . . less able to evaluate the consequences of . . . her conduct." Hodgson, 497 U.S. at 459 (O'Connor, J., concurring in part, and concurring in the judgment in part) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)); Bellotti II, 443 U.S. at 635 (op. of Powell, J.) (noting that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them" and therefore that the state validly may limit their freedom to choose). The parents, on the other hand, "possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions" and the "natural bonds of affection" lead them to act in their children's best interests. Hodgson, 497 U.S. at 495 (Kennedy, J., concurring in the

judgment in part and dissenting in part) (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

Certainly, therefore, the state may conclude that a minor's abortion decision will be more informed and better considered if her parents know of her impending decision and thus are able to assist her in making that grave decision. As Justice Kennedy has written:

> A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. . . . The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. . . . It would deny all dignity to the family to say that the State cannot take this reasonable step [of requiring parental notice] to ensure that, in most cases, a young woman will receive guidance and understanding from a parent.

Akron II, 497 U.S. at 520 (op. of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.); see also Casey, 505 U.S. at 895 (majority) (noting that parental notice or consent statutes "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart"); Hodgson, 497 U.S. at 458 (O'Connor, J., concurring in part and concurring in the

judgment in part) ("[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.") (quoting Bellotti II, 443 U.S. at 640-41 (op. of Powell, J.)).

Finally, parental notice statutes serve the important state interest of ensuring that the physician advising the minor on her abortion decision has access to the child's full medical and, where relevant, psychological, history. The Court has repeatedly observed that,

> [t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Akron II, 497 U.S. at 519 (quoting Matheson, 450 U.S. at 411); see also id. at 518-19 ("We continue to believe that a State may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician."); cf. id. at 518 (recognizing "the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice"). Relatedly, by ensuring that parents are informed of their child's intention to obtain an abortion,

the parental notice statute also enables the parents to advise their daughter on her choice of a competent and compassionate physician, see Bellotti II, 443 U.S. at 641 n.21 (op. of Powell, J.) (noting that even "mature" 17-year olds "are less likely than adults to know or be able to recognize ethical, qualified physicians"), and to better support their daughter's physical and emotional recovery in the aftermath of the abortion, if that is the course decided upon.

In short,

> [t]here can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child.

Hodgson, 497 U.S. at 445 (op. of Stevens, J.) (quoting Danforth, 428 U.S. at 91 (Stewart, J., concurring)); see also id. at 480 (Kennedy, J., concurring in the judgment in part, and dissenting in part) (same).

2.

At the same time that the state indisputably furthers legitimate purposes when it requires notice to responsible parents, the effect of such a notice requirement on the abortion right is markedly different from that of a consent requirement, as the Supreme Court has noted in every case in which it has addressed a parental notice or consent provision.

A statute that conditions a minor's access to abortions on parental consent, by definition, gives parents an absolute, and potentially arbitrary, veto over their child's decision. See Danforth, 428 U.S. at 74. Absent a judicial bypass, such a

statute unmistakably places a substantial obstacle in the path of the minor who would choose abortion over childbirth. The ultimate abortion decision is, in reality, that of the parent, not that of the minor.

The effect of a mere notice provision on the abortion decision is different not merely in degree, but in kind. A parental notice statute that includes the specific exceptions constitutionally mandated by the Court in Hodgson vests with parents neither a veto in fact nor a veto in effect. As the Supreme Court has consistently recognized, the choice of whether to abort the pregnancy remains ultimately and exclusively that of the minor. See discussion supra at 16-17 (citing cases).

Nor does a parental notice requirement that excepts notice to the abusive, the irresponsible, the permanently absent, or the similarly disaffected parent, otherwise constitute a substantial obstacle to, or an undue burden on, the abortion decision. Although we appreciate well the emotional trauma that can attend a discussion between parent and child on a subject so fraught with moral, ethical, and religious implications as abortion, a mere notice requirement does not even necessarily force such a discussion between the minor and her parents; insofar as the law is concerned, the young woman need not even return home or otherwise establish contact with her parents following the required notice and before the abortion is performed. To be sure, if the young woman does willingly return home, or even if she only initiates telephone contact with her parents, she will almost certainly be exposed to her parents' views on the grave decision she contemplates. And, we may assume, those views may be passionately held, contrary to her own, and forcefully expressed. But the period of time between notice and abortion during which the minor may be exposed to those views is typically short (and may be shorter still, if she chooses to contact her parents only by telephone), and, during this short

period, the young woman has but to listen to her parents; at least under a pure notice statute, the law does not even undertake to require consultation in the sense of a frank and open exchange between mutually receptive parent and child. And in no event need the minor conform or otherwise accommodate her plans to the desires of her parents.

We understand fully, and do not discount, the influence, if not pressure, that can be brought to bear (intentionally or not) during a discussion between parents and a child who is in the throes of a decision so emotionally wrenching as that of whether to end a pregnancy (whether the parents approve of abortion or not), even as we recognize also the tendency of teenagers in difficulty to exaggerate their parents' likely reactions to their dilemmas and to underestimate their parents' capacity for understanding and compassionate response. The opinions the parents express and the advice the parents impart will undoubtedly change the calculus of the child's decision, as properly they should. In all but the rarest of circumstances, this discussion will force the young woman, whether admittedly or not, to examine and reexamine the decision she has preliminarily made, against not only her own values, morals, and beliefs, but, where they differ, against those of her mother and her father. And, assuredly, the reaction the minor gets and the counsel she receives from her parents will, in many instances, bring about either a change of mind or a change of heart, and a consequent change in decision from that she initially reached without the benefit of her parents' experience and insight. To imagine the discussion between the concerned parents and their frightened daughter is to understand the power of the dynamic to add to the burden of the imminent decision.

However, without minimizing its effect, this additional imposition on the minor's otherwise completely unfettered abortion decision cannot be said to constitute a burden that is "undue" under a Constitution that jealously protects the

sanctity of the family as the cornerstone of society. For, in the end, the decision of whether to carry the pregnancy to term remains that of the minor woman alone, and no one else. And the incremental weight added to the young woman's abortion decision through the encouraged parental involvement is an incidental and inescapable consequence of the state's pursuit of its legitimate interests not only in the minor's informed consent and health, but also in preservation of the cardinal right of responsible parents to shape, as they deem appropriate, their children's lives, their beliefs, their values, their morals, their character. Just as it is in large part the absence of this latter interest which renders unconstitutional a spousal notice statute or a parental notice statute which requires notification to abusive parents or parents who have not taken responsibility for the support or upbringing of their children, so is it the presence of this interest that in substantial part renders constitutional the properly tailored parental notice statute. See, e.g., Casey, 505 U.S. at 898 (majority) (distinguishing parental notice or consent requirements from spousal notice requirements on the grounds that "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children"); Hodgson, 497 U.S. at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part) (observing that notice statutes "represent[ ] a considered weighing of the competing interests of minors and their parents"); compare id. at 445-46 (op. of Stevens, J.) (noting that a natural parent's interest in "controlling the education and upbringing of their children" rises to the level of a liberty interest only through "the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility") with id. at 450 (op. of Stevens, J., for the Court) (holding that the state has no legitimate interest in requiring notice to a parent who has not assumed such responsibility).

Indeed, to hold that the Constitution affirmatively forbids a state from requiring that mothers and fathers of

pregnant teenagers merely be told of their daughters' decisions to abort their pregnancies would be nothing less than an arrogation of the parental role by judicial fiat, a wresting from parents and rendering unto the courts of the privileges and responsibilities that are parenthood itself. And this, at the very moment when not only child is most in need of parent, but also, paradoxically, parent is most in need of child. Not only does the Constitution not require such an expropriation of the rights and duties of mother and father, we doubt that the People would submit to such. Even in an age of tolerance, not all is tolerable-- or to be tolerated.

B.

Accordingly, we hold today that the state may constitutionally require that mothers and fathers of teenage daughters be informed of their daughters' life-defining decisions to abort their pregnancies, provided that the state excepts from its requirement notice to abusive parents, noncustodial parents who have refused to accept their parental responsibilities, and parents with similar relationships to their children, as required by the Supreme Court's decision in Hodgson. In contrast to the full panoply of safeguards required of parental consent statutes, more is not required of the state in order for its mere notice statute to withstand facial constitutional challenge.

In particular, as to the "best interest" bypass, we hold that a notice statute that includes at least the Hodgson "best interest" exceptions for abusive or neglectful parents and parents who have otherwise refused to accept the responsibilities of parenthood, is facially constitutional, without more. While the Supreme Court might eventually require that a parental notice statute include a "best interest" bypass that would except notice in additional circumstances akin to those identified in Hodgson, we do not believe that those circumstances are likely to be sufficiently large in

number that such a statute must account for them in order to withstand a facial challenge to its constitutionality. And, because a broader bypass would be in substantial tension, if not irreconcilable, with the liberty interest of parents to decide for themselves, as free as possible from governmental interference, what is and what is not in the best interests of their own children, we do not believe it likely that the Court will constitutionally require, for purposes of a facial challenge, a broader "best interest" bypass -- for example, one that would allow exceptions to notice for reasons wholly unrelated to the safety or health of the minor or to parental forfeiture of rights. Such a wholesale substitution of court for parent we do not understand the Court's precedents to contemplate. See id. at 491 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.") (quoting Matheson, 450 U S. at 423-24 (Stevens, J., concurring in the judgment)) (emphasis omitted); cf. Bellotti II, 443 U.S. at 648 (op. of Powell, J.) (noting that in a consent bypass proceeding the court properly should take into account that there is "an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision" and that "parents naturally take an interest in the welfare of their children -- an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents").

As to the "mature minor" bypass, we hold that a notice statute that is tailored so as to satisfy the requirements of Hodgson need not include, in addition, a bypass for the mature minor in order to pass constitutional muster. Cf. Akron I, 462 U.S. at 469 n.12 (O'Connor, J., joined by White and

Rehnquist, JJ., dissenting) (noting that "no decision of this Court has yet held that parental notification in the case of mature minors is unconstitutional" and that in Matheson, the Court "expressly did not decide that a parental notification requirement would be unconstitutional if the state otherwise permitted mature minors to make abortion decisions free of parental or judicial 'veto'" (citations omitted; first emphasis in original; second emphasis added)). We recognize that a requirement that a mature minor provide notice of her abortion to her parents -- like a requirement that an immature minor provide such notice -- will inhibit some abortions. "That a state regulation may 'inhibit' abortions to some degree," however, "does not require that we find that the regulation is invalid," as Justice O'Connor has observed. Id. at 464 (citing Matheson, 450 U.S. at 413). And we are satisfied that, in the vast majority of instances, notice to parents will do no more than this, provided exceptions exist for the abusive and neglectful parent, and the parent who has otherwise refused to accept responsibility for his or her child.

A notice requirement does not become a veto merely because the minor has become mature enough that she must be allowed to decide for herself whether to end her pregnancy. Indeed, there is every reason to believe that the burden imposed upon the mature minor by a parental notice requirement will actually be less onerous than that imposed upon the immature minor. As Justice Stevens has noted, "[a]lmost by definition, . . . a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." Matheson, 450 U.S. at 425 n.2 (Stevens, J., concurring in the judgment).

Moreover, that a young woman may, under law, be considered sufficiently mature that she must be allowed to make the ultimate abortion decision, does not mean that she is in fact mature or that she is mature in all respects, and it

certainly does not mean that she is mature enough that the state no longer has a legitimate and substantial interest in encouraging her to seek parental counseling, guidance, and assistance with regard to the abortion decision. As the Court itself has acknowledged, "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." Id. at 408 (majority); see also Danforth, 428 U.S. at 75 ("[O]ur holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."). Thus, even the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more informed, better considered, abortion choice. Cf. Bellotti II, 443 U.S. at 643 n.23 (op. of Powell, J.) ("[T]he fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended.").

She will be better able to select the physician who will perform the abortion, if she decides upon ending the pregnancy. See id. at 641 n.21 (noting that even 17-year olds "are less likely than adults to know or be able to recognize ethical, qualified physicians"). She will be better situated to provide her physician with the full medical history necessary to the professional treatment she will undergo. And with her parents' knowing involvement, her physical and emotional post-operative recovery will be eased.

Finally, it should go without saying, the parents' interest in the well-being, and continued care and support, of their minor daughter likewise does not cease upon a judicial finding that their daughter is sufficiently mature to make the abortion decision herself. As a factual matter, of course, that interest presumptively continues for life; but, even as a matter of law, that interest continues at least until the child achieves majority. Although the age of majority might be considered

arbitrary, in the most important sense it is not. It represents the collective experience and insight of a society with respect not merely to the physical, but also to the emotional, development of its children and their ability to make mature decisions without parental assistance.

In sum, we find unassailable Justice Stevens' considered conclusion in Matheson, that,

> [t]he fact that certain members of the class of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies" may actually be emancipated or sufficiently mature to make a well-reasoned abortion decision does not . . . undercut the validity of [a notification statute that requires immature and mature minors alike to provide notice of their abortion decision to their parents]. . . . [A] state legislature has constitutional power to utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution.

Matheson, 450 U.S. at 424-25 (Stevens, J., concurring in the judgment); id. at 425 n.2 (noting that "if every minor with the wisdom of an adult has a constitutional right to be treated as an adult, a uniform minimum voting age is surely suspect").

VI.

Measured against the foregoing standards, it is evident that the Commonwealth of Virginia's parental notice statute comfortably passes constitutional muster as a facial matter.

A.

Initially, and quite possibly dispositively, the Commonwealth's notice provision suffers from neither of the flaws of the Minnesota notice statute at issue in Hodgson.

First, the Virginia parental notice statute, in contrast to the two-parent notice provision invalidated in Hodgson, does not require notice to absent or noncustodial parents who have not assumed significant responsibility for their children's care and upbringing. The general notice provision requires notice to "an authorized person," who, in turn, is defined as:

> (i) a parent or duly appointed legal guardian or custodian of the minor or (ii) a person standing in loco parentis, including, but not limited to, a grandparent or adult sibling, with whom the minor regularly and customarily resides and who has care and control of the minor.

Va. Code § 16.1-241(V). Therefore, a minor is, at most, required to notify only one parent, and, if the person who has assumed responsibility for the minor's care and upbringing is someone other than her parent, she may provide notice to that person instead. Consequently, the statute never requires a minor to notify a parent with whom she does not reside or who has not undertaken to provide for her care and well-being.

Second, the Virginia statute does not require notice to abusive parents. In fact, the statute includes an express notice exception for abused minors:

> [N]either notice nor judicial authorization shall be required if the minor declares that she is abused or neglected and the attending physician has reason to suspect that the minor may be an abused or neglected child as defined in § 63.1-248.2 [of the Virginia Code] and reports the suspected abuse or neglect in accordance with § 63.1-248.3. Id. § 16.1-241(V).[7]

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[7] Moreover, the statute also provides for an abortion without notice or judicial authorization when,

> in the attending physician's good faith medical judgment, (i) the abortion is medically necessary immediately to avert the minor's death or (ii) there is insufficient time to provide the required notice or judicial authorization because a delay would create a serious risk of substantial impairment of a major bodily function or substantial physical injury.

Va. Code § 16.1-241(V). These exceptions to the notice or judicial authorization requirements ensure that the statute's requirements will not endanger the minor's health or life.

Appellees argue for the first time on appeal that this provision of the statute is unconstitutional because it does not allow abortions without notice when delay would risk the minor's emotional health. See Appellees' Brief at 27-28, 4, 13. Even assuming that this argument has not been waived, it is meritless.

We doubt that the Court would require an emotional health exception even to an abortion regulation that banned certain abortions entirely, and Casey settles beyond doubt that a state need not provide such an exception to a requirement -- like the notice requirement at issue here -- that merely delays the contemplated abortion for a short period of time. The medical emergency exception to parental consent in the Pennsylvania statute upheld by the Court in Casey defined medical emergency as

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a

Appellees do not suggest any reason why this abuse exception is not wholly efficacious.

From our own review of the statute it appears that this abuse exception perhaps may not be sufficient in and of itself to satisfy Hodgson because of the possibility that the provision's reporting requirement could indirectly result in notice to the abusive parent. As we have discussed, a majority of the Court in Hodgson, and Justice O'Connor in particular, concluded that an abuse exception is "less than effectual" where the abuse must be reported and the resulting investigation would provide the parent indirect notice of the minor's abortion decision. Hodgson, 497 U.S. at 460

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pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Casey, 505 U.S. at 879 (majority) (quoting 18 Pa. Cons. Stat. § 3203 (1990)). With regard to physical health, the Casey medical emergency exception to consent is, on its face, more restrictive than Virginia's medical emergency exception to notice, which does not require that the doctor conclude that delay risks "irreversible impairment" and which specifically provides for an exception to notice when delay risks "substantial physical injury," not merely "substantial impairment of a major bodily function." Moreover, with regard to emotional health, the two emergency exceptions are identical: the Casey statute, like the Virginia statute, appears on its face to make no allowance for an "emotional health" emergency. And, indeed, the Court of Appeals' construction of the Casey medical emergency exception, to which the Supreme Court deferred, see id. at 880, was clearly limited to "[p]hysically threatening emergencies." Planned Parenthood v. Casey, 947 F.2d 682, 702 (3d Cir. 1991); see also id. at 701 ("The essence of the definition . . . is that it allows a woman and her doctors to forego many of the Act's requirements when there is a medical emergency to the woman's physical health . . . .") (emphasis added). Accordingly, the facial constitutionality of Virginia's medical emergency exception cannot be disputed.

(O'Connor, J., concurring in part and concurring in the judgment in part).

However, even assuming that this abuse exception may be inadequate while standing alone,[8] the abused minor is

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[8] It may be that the risk of indirect parental notice of the minor's abortion decision and, in particular, the risk that indirect notice will occur before the minor can carry out her decision, is significantly lower under the Virginia statute than under the Minnesota statute at issue in Hodgson. The Court found that the Minnesota law provided a parent who was the subject of an investigation "a right of access to the record of the investigation." Hodgson, 497 U.S. at 460 (O'Connor, J., concurring in part and concurring in the judgment in part) (citation omitted). Presumably, the Court was concerned that this record would include the fact that the abuse complaint was initiated when the minor sought an abortion without notice from a physician on the ground that she was abused.

In contrast, Virginia law apparently gives the parent "access to his own record" only when the abuse report was determined by the social services agency to be unfounded, Va. Code § 63.1-248.5:1.A., and perhaps not even then as a matter of course, see id.§ 63.1-248.5:1.C (requiring the parent to petition the court for release of the record), and gives a parent whom the agency believes or suspects abused the child access to the information used to make that determination only if such disclosure would not "endanger the well-being" of the child and is not prohibited by state or federal law, id. § 63.1-248.6:1.A. Thus, in most cases, the only information provided to the parent will be a report by the agency assessing whether the initial "report of abuse or neglect is founded or unfounded," sent within 45 days of the time that the abuse is reported. Id. § 63.1-248.6.E.7. Presumably, neither this report nor any disclosure of the investigative record to a parent suspected of abuse would detail the circumstances surrounding the initial abuse report, particularly where, as here, such disclosure would be constitutionally suspect and would contravene, in spirit if not by terms, the confidentiality provisions of the Virginia notice statute, see discussion infra, which require that the minor's decision to bypass notice be strictly confidential "n]otwithstanding any other provision of law." Va. Code § 16.1-241(V).

Moreover, the non-judicial abuse exception in the statute invalidated in Hodgson required that the physician report the abuse within 24 hours, whereupon the state welfare agency would "immediately conduct an assessment and offer protective social services" to the minor. Hodgson, 497 U.S. at 426 n.7 (op. of Stevens, J., for the Court) (emphasis added). If the

fully protected under the Virginia statute -- as under the Minnesota notice statute ultimately upheld in Hodgson -- because the statute includes a mandatory best interest bypass which allows an abused minor to bypass notice. The Virginia statute provides:

> After a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion. If the judge determines that the minor is not mature, the judge shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's

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agency then interviewed the minor, it was required to notify the parent that the interview had occurred. See id. at 460 (O'Connor, J., concurring in part and concurring in the judgment). As Justice O'Connor's opinion noted, the agency's assessment and the concomitant notice to the parent could all occur "in a time frame even before the abortion occurs." Id. (quoting Tr. of Oral Arg. at 19). In contrast, although the Virginia reporting statute advises physicians to report abuse "immediately," the physician can wait to report the abuse for up to 72 hours without penalty. See Va. Code § 63.1-248.3.B. And, unless the minor is in need of immediate protective care -- in which case her removal from the home will prevent the parent from obstructing her abortion decision -- the parent is apparently not entitled to notice of the investigation until the agency is required to report on its assessment of the charges within 45 days of the initial abuse report. Additionally, Virginia law does not appear to require notice to the parent even when the minor is interviewed by social services. See id. § 63.1-248.10.

Thus, in most cases, if indirect notice of the minor's abortion decision occurs at all, it will not occur until after the minor has had the opportunity to obtain an abortion. While the risk that her parent will eventually discover her decision may make a minor more reluctant to undergo an abortion, that effect is much more attenuated than the actual obstruction that may result if the abusive parent learns of her decision before she obtains the abortion.

> best interest, and if the court finds that the abortion would be in the minor's best interest, it shall so authorize a physician.

Va. Code § 16.1-241(V) (emphasis added).[9] Because the courts of the Commonwealth would be required under Hodgson, as well as by the bypass language itself, to authorize the abused minor to proceed with an abortion without notice under this best interest bypass, the abused minor's interests are protected against the contingency of indirect notice to the abusive parent or parents.[10] Indeed, the Virginia statute's best

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[9] It is not entirely clear whether the statute directs the court to authorize the abortion when the abortion is in the child's best interest or when the abortion without notice to her parents is in the child's best interest. The statutory language references both inquiries: it instructs the judge to consider whether "an abortion upon the minor without notice to an authorized person would be in the minor's best interest," but then it directs the judge to authorize the abortion if the "court finds that the abortion would be in the minor's best interest." Va. Code § 16.1-241(V). In any event, the Supreme Court made clear in Lambert that any difference between these two formulations is immaterial to the constitutionality of the statute. See Lambert, 117 S. Ct. at 1171 (noting that the Supreme Court held in Akron II that a statute authorizing bypass if "notice is not in [the minor's] best interests" satisfied the requirement for a best interest bypass in Bellotti that the minor be allowed to show that the "abortion would be in her best interests") (citations and internal quotations omitted).

[10] The Court in Hodgson affirmed that such a best interest bypass adequately protects abused minors and cures the inadequacy of a statute's non-judicial abuse exception when it upheld the version of the Minnesota notice statute that included a best interest judicial bypass, even though the statute's specific abuse exception was ineffective. See Hodgson, 497 U.S. at 460-61 (O'Connor, J., concurring in part and concurring in the judgment in part) (explaining that the Minnesota notice statute passed constitutional muster with a judicial best interest bypass, even though it was unconstitutional without the bypass because of the risk that invoking the non-judicial abuse exception would result in indirect notice to the parents); id. at 492-93, 497 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in the judgment in part and dissenting in part) (concluding that the non-judicial abuse exception was alone sufficient to validate the Minnesota statute even if the risk of indirect notice to a parent

interest bypass not only protects a minor from having to provide notice to an abusive parent, it also sweeps more broadly, guaranteeing a minor the right to bypass notice whenever she can demonstrate that her parents are likely to impede her choice contrary to her best interest. The Virginia statute thus provides safeguards well beyond those mandated by Hodgson.

It might be argued from the language of the Virginia statute that a mature minor cannot avail herself of the best interest bypass because the court is directed to consider the minor's best interest only after the court finds that the minor does not qualify for the maturity bypass. The mature minor obviously has no need for such a best interest bypass if her maturity alone is sufficient to guarantee her the opportunity to proceed without parental notice, but appellees contend that the Virginia statute confers discretion on a court to deny a mature minor the right to bypass notice.

Even if the maturity bypass truly is discretionary as appellees contend, see discussion infra, it must be assumed that the judicial discretion to deny bypass is not unbounded, but rather must be exercised in the best interest of the minor. It would be a strange construction of the statute that would require the court to allow an immature minor to bypass parental notice when notice was not in her best interest, but that would allow the court to disregard the best interest of a

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deterred some minors from seeking abortions because it was reasonable "[b]eyond any question" for "the State to require that physicians report declarations of abuse to ensure that mistreatment is known to authorities responsible for the protection of minors" and that the statute was, of course, a fortiori constitutional with a best interest bypass); see also Akron II, 497 U.S. at 508, 515 (sustaining a parental notice statute with a judicial bypass for abuse that required an abused minor to prove a "pattern" of abuse by "clear and convincing evidence" before judicial bypass would be permitted).

mature minor simply because she is mature.[11] Thus, if the maturity bypass does prove to be discretionary, it is reasonable to assume that the discretion of the judicial officer will be constrained by the duty to act in the best interest of the child.

Moreover, because the Constitution requires that Virginia's bypass authorize an abused minor -- whether mature or immature -- to proceed without parental notice, and because the Virginia statute is reasonably susceptible of such a construction, we, as a federal court, are required by principles of federalism and comity to assume that the Virginia courts will construe the statute so as to provide a mandatory notice bypass for an abused mature minor. See, e.g., Akron I, 462 U.S. at 441 ("It is reasonable to assume . . . that a state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with constitutional requirements."); Lambert, 117 S. Ct. at 1174 (Stevens, J., joined by Ginsburg and Breyer, JJ., concurring in the judgment) (noting that the Ninth Circuit "erroneously construed the statute in a manner that caused that court to hold the statute unconstitutional" and affirming that, although the language of the Montana statute at issue was somewhat ambiguous, "it [wa]s surely appropriate to assume" a construction that obviated any constitutional concern). To assume otherwise would be to ignore the clear and express requirement of Virginia law that Virginia courts interpret state statutes so as to save them from unconstitutionality, see note 17 infra, and to invalidate prematurely on a facial challenge a state statute that the Virginia courts have yet not had an opportunity to construe.

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[11] We do not believe that the Virginia statute purports to authorize the court arbitrarily to withhold or grant authorization to the mature minor to proceed without parental notice, and -- in this context -- any decision that would be contrary to the minor's best interest would almost certainly be arbitrary as well.

These considerable statutory safeguards for the child's best interest confirm that Virginia's statute is plainly adapted to the legitimate purposes of promoting informed consent, facilitating physicians' access to relevant medical information and otherwise ensuring that minors obtain appropriate medical care, as well as to accommodating the liberty interests of parents in the rearing, care, and guidance of their children. They also confirm beyond question that the statute cannot possibly be understood to afford parents a veto over their child's abortion decision. The statute does not require that notice be given to parents who are abusive, or who have not assumed significant responsibility for their children, and thus avoids the constitutional defects of the statute struck down in Hodgson. It also includes both a broader mandatory best interest judicial bypass and, quite possibly, a mandatory bypass for minors who are sufficiently mature that they can determine for themselves whether to end or carry their pregnancy to term.[12] See discussion infra. Such a statute is unquestionably constitutional, having neither the purpose nor the effect of placing a substantial obstacle in the path of the minor who wishes to obtain an abortion.

B.

Even if the Commonwealth's Parental Notice Act were not constitutional for the reasons recited, we would still be obliged to sustain the statute as against appellees' facial challenge to its constitutionality. Although the Supreme Court has never held that a notice statute must include a Bellotti II bypass, the Court has repeatedly held, as we have discussed, that the constitutionality of a notice statute that does meet the Bellotti II standards is beyond question, "it [being] a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice

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[12] As we discuss infra, there is no question at all that Virginia adequately ensures that its bypass proceedings are both confidential and expeditious.

also for a notice statute," Akron II, 497 U.S. at 511. Virginia courts could readily interpret the Commonwealth's parental notice statute to satisfy the Bellotti II requirements, and therefore it would be premature for us, as a federal court, to further question its facial constitutionality.

In almost every respect, the judicial bypass in the Commonwealth's statute is constitutionally indistinguishable from, and arguably more protective of the minor's abortion right than, the bypass held by the Court in Akron II to be adequate to sustain Ohio's single-parent notification statute. And, in many respects, it is also more protective of the minor's abortion right than the bypass in Hodgson, which a majority of the Court held validated the more intrusive law at issue in that case.

First, as discussed, the Virginia statute, like the Ohio statute in Akron II and the Minnesota statute upheld in Hodgson, provides for judicial bypass of the notice requirement in cases where the court finds that an abortion without notice would be in the best interests of the minor. Indeed, the Ohio statute required the minor to prove by "clear and convincing evidence" that notification was not in her best interest before bypass was allowed. Ohio Rev. Code § 2151.85(C)(2). Obviously, this "clear and convincing evidence" standard works a greater burden on the minor's right to an abortion than does the preponderance of the evidence standard of the Virginia statute.

Second, as required in the parental consent context, the Virginia statute guarantees confidential bypass procedures. The Ohio statute in Akron II forbade the court to "notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion," Ohio Rev. Code § 2151.85(D), and further provided that all bypass hearings "be conducted in a manner that will preserve the anonymity" of the minor, including a requirement that "[t]he

complaint and all other papers and records that pertain to an action [for judicial bypass] . . . be kept confidential and are not public records." Id. § 2151.85(F). Similarly, the Commonwealth's statute specifically provides that "[c]ourt proceedings under this subsection shall be confidential," and that "[n]otwithstanding any other provision of law, an expedited confidential appeal to the circuit court shall be available to any minor for whom the court denies an order authorizing an abortion without notice." Va. Code § 16.1-241(V) (emphasis added).

Appellees argue that, when judged against the Bellotti II consent standards, the Virginia confidentiality guarantees are inadequate because the law only makes "proceedings" confidential and does not explicitly guarantee the confidentiality of court records. Appellees' Brief at 5, 26. However, the Chief Justice of the Virginia Supreme Court, in his role as "the administrative head of the judicial system," Va. Const. Art. VI. § 4, has issued, through the Office of the Executive Secretary of the Court, specific instructions to the judges and clerks who will handle cases under the parental notification law that they shall ensure that all records and proceedings be kept strictly confidential. The Chief Justice has imposed upon judges and clerks an obligation to adhere to the most rigorous standard of "deep confidentiality," see J.A. at 399-400, 433-44, and interpreted "[c]onfidentiality of the proceedings (and the records of those proceedings)" as "a right specifically guaranteed by Virginia Code § 16.1-241(V)," J.A. at 399, 433 (emphasis added).

The Virginia Supreme Court instructions also answer appellees' second objection that the confidentiality provisions will be circumvented by other sections of the Virginia juvenile code which, while guaranteeing "confidentiality" in juvenile proceedings, also provide that the court shall issue a summons "to the parents, guardian, legal custodian or other person standing in loco parentis, and such other persons as appear to

the court to be proper or necessary parties to the proceedings." Va. Code. § 16.1-263. The instructions specifically pro vide that "[t]he petitioner is the only party to [the bypass] proceeding" and that "[n]o parent, guardian, custodian, or other person standing in loco parentis to the petitioner should be served with a notice" of the proceeding. Id. at 376, 395, 429. This interpretation is clearly the most logical synthesis of the Act and the background provisions governing juvenile proceedings: it would make little sense for a judge to conclude that a parent is a "proper or necessary part[y]" to a proceeding, the very purpose of which is to avoid providing that parent notice of her child's actions. Similarly, the explicit guarantees of confidentiality in the judicial bypass provision would obviously trump the general rule in juvenile proceedings that court records are open for inspection to the child's parent. See Va. Code § 16.1-300(A)(3). And, tracking the language of the notice statute itself that confidentiality is to be maintained "[n]otwithstanding any other provision of law," id. § 16.1-241(V), the Virginia Supreme Court has instructed that "[t]he customary exceptions to confidentiality which are found in or read into Virginia Code §§ 16.1-302 and -305 are not applicable to these bypass proceedings." J.A. at 400, 434.

These imposing confidentiality protections provided for in the Virginia statute and promulgated by the Virginia Supreme Court would be adequate to sustain a consent statute, and they clearly are adequate to sustain the notice provision at issue here. Indeed, the judicial bypass to two-parent notice in Hodgson provided only that "[p]roceedings" of the court be "confidential," and did not make explicit provision for the confidentiality of court records, see Hodgson, 497 U.S. at 428 n.9 (op. of Stevens, J., for the Court) (quoting subdivision 6(c)(iii) of the Minnesota statute), and the Court readily approved that statute.

Third, Virginia's parental notice statute provides for expeditious resolution of minors' bypass petitions. Under the

Ohio statute in Akron II, the trial court was required to make its decision within five business days of the filing of the minor's petition, Ohio Rev. Code § 2151.85(B)(1); the court of appeals was required to docket a minor's appeal within four days, id. § 2505.073(A); and the court of appeals was required to render a decision within five days of docketing the appeal, id. The Virginia law, by comparison, requires the court to hear the minor's bypass petition "as soon as practicable but in no event later than four days after the petition is filed," and it further provides that a minor's appeal of a denial of bypass "shall be heard and decided no later than five days after the appeal is filed." Va. Code. 16.1-241(V). Because the Virginia time frame for decision on appeal is predicated only on the date that the minor files her appeal and does not allow any delay by the court of appeals in docketing her appeal, it appears that the longest interval contemplated by the Virginia statute between a minor's filing of her petition and the resolution of any appeal may well be significantly shorter than under the Ohio statute. Thus, Virginia's bypass procedures are, if anything, likely to be more expeditious than the Ohio procedures upheld by the Supreme Court in Akron II.[13]

Appellees contend nonetheless that the Virginia statute does not provide for sufficiently expeditious resolution of

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[13] Moreover, one might assume from the fact that the Ohio statute's deadline for trial court decision explicitly counts only business days and not calendar days, that all of the references to "days" in the Ohio statute are to business days. Under such a reading, it could take a minor up to 22 calendar days under the statute to obtain judicial bypass of the notification requirement. Virginia's bypass provisions nowhere refer to business days, and therefore it is reasonable to assume that its expedited time frames are calculated by reference to calendar -- rather than business -- days, except perhaps when the last day of the time period falls on a Saturday, Sunday, or legal holiday, in which case the time frame may expire on the next business day. See Va. Code § 1-13.3:1 (stating that when the "last day [of a time period] fixed by statute . . . falls on a Saturday, Sunday, legal holiday, or any day on which the clerk's office is closed as authorized by statute," the time frame will expire on the next business day).

minors' bypass requests because, although it requires that petitions be heard by the district court within four days of filing, it does not expressly specify how quickly such petitions must be decided. The Virginia statute does, however, command that bypass proceedings "be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor." Va. Code § 16.1-241(V). Additionally, the guidance given by the Virginia Supreme Court to its lower courts clearly contemplates that, in accordance with the long established practice of Virginia's Juvenile and Domestic Relations Courts, see J.A. at 456, 469, the decision on the petition will usually be made at the end of the hearing held within four days of filing:

> The order granting or denying the petition should be entered at the end of the hearing using the form entitled ORDER IN PROCEEDING SEEKING JUDICIAL AUTHORIZATION OF ABORTION. A copy of this form is attached. The petitioner should be provided with an attested copy of the order before she leaves the court.

J.A. at 378, 431 (emphasis added). Elsewhere in the guidance, the Virginia Court does acknowledge that the lack of a deadline for deciding the petition may allow a court to take the petition under advisement, but the court pointedly cautions that "exercising the ['advisement option'] liberally certainly conflicts with the urgency of the proceedings, as reflected in the tight statutory time frames" and that "[t]oo long a delay in adjudicating a bypass petition could have constitutional implications." J.A. at 412, 445-46. The unmistakable implication is that, whenever possible, petitions should be resolved within the statutory four-day period required for holding hearings. No more is required to sustain the statute against a facial challenge.

The bypass provision upheld by the Court in Hodgson required only that the court give precedence to bypass petitions and resolve them promptly, see Hodgson, 497 U.S. at 428 n.9 (op. of Stevens, J., for the Court) (quoting subdivision 6(c)(iii)-(iv) of the Minnesota statute, requiring the court to give the minor's petition "precedence over other pending matters so that the court may reach a decision promptly and without delay" and providing for an "expedited . . . appeal"). It did not prescribe any specific time frames in which the court had to hear or decide the minor's petition. Similarly, the one-parent consent statute upheld by the Court in Ashcroft apparently did not specify a time frame for deciding the minor's bypass petition. 462 U.S. at 479 n.4. Neither of these provisions was considered insufficient to ensure expeditious resolution of bypass requests, and we have no reason to so consider the provision before us.

Appellees contend that a judge still may flout the clear language of the statute and the cautionary instructions of the Virginia Supreme Court and withhold decision for an indefinite time after hearing a case under the Act. This argument not only inappropriately ascribes a form of lawlessness to the judges of the Commonwealth of Virginia, it is also irrelevant in the context of a facial challenge to this statute. See Akron II, 497 at 515 ("Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements."). In any event, according to the state, every bypass petition heard and decided by the Virginia courts thus far has, in fact, been decided no later than the fourth day after filing. Appellant's Reply Brief at 5.

The only possibly relevant distinction between the Ohio notice statute in Akron II, which satisfied the Bellotti II consent statute requirements, and Virginia's statute, is in the maturity bypass. The Ohio statute provided that, "if the court finds, by clear and convincing evidence, that the complainant

is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian." Ohio Rev. Code § 2151.85(C)(1) (emphasis added). Similarly, the Minnesota statute at issue in Hodgson required the court to authorize the minor to obtain an abortion if the court determined that she was mature. 497 U.S. at 427 n.9 (op. of Stevens, J., for the Court) (quoting subdivision 6(c)(i)). Virginia's statute, by contrast, provides that "[a]fter a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion." Va. Code § 16.1-241(V) (emphasis added). Appellees argue that this distinction is crucial because Virginia's use of the term "may," rather than "shall," confirms that the Virginia maturity bypass vests discretion in the court to deny a mature minor's bypass petition, and that that discretion alone renders the Virginia statute unconstitutional on its face.

We have concluded today that the Supreme Court would not require a parental notice provision that satisfies Hodgson to also provide a maturity bypass, and this is especially so where, as in this case, the statute includes even a fuller best interest bypass. See discussion supra. It follows, therefore, that where the state does provide a maturity bypass, as Virginia does, we do not believe that the presence of some residual discretion in the judge to require a "mature" minor to notify her parents when such notice is in her best interest works an undue burden on a mature minor's abortion right. And it certainly cannot be said in a facial challenge either that there are no circumstances in which such an act would be valid, see Salerno, 481 U.S. at 745, or that the provision poses a substantial obstacle to exercise of the abortion right "in a

large fraction" of cases, Casey, 505 U.S. at 895.[14] Thus, in our view, the Virginia courts are not constitutionally required to construe the Commonwealth's statute so as to deprive the juvenile courts of all discretion to require mere notice to the parents of even a mature minor.

We are comfortable, however, that the Commonwealth's maturity bypass provision could reasonably be interpreted to require notice bypass for mature minors, and this would be sufficient alone to sustain the statute against appellees' facial challenge. The Virginia courts have yet to interpret the statute authoritatively,[15] but under established

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[14] As discussed supra note 1, the circuits are split over whether the Salerno standard for facial challenges applies in the abortion context after Casey. See Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997). Although our circuit suggested in dicta in Manning that the Salerno standard remains the governing standard until the Supreme Court explicitly holds otherwise, see Manning, 119 F.3d at 268 n.4, it is unnecessary for us to resolve this question in this case, because plaintiffs cannot meet either the Salerno standard or the Casey standard.

[15] We reject appellees' contention that the Virginia Supreme Court has, in its administrative capacity, authoritatively construed the maturity bypass as discretionary. See Appellees' Brief at 7, 22. Appellees' argue that, by issuing forms for use by the juvenile courts which provide a place for the court that has found a minor mature to check either a box indicating that the petition is granted or a box indicating that the petition is denied, the Commonwealth has definitively construed the maturity bypass to be discretionary. Appellees' Brief at 7 (citing forms at J.A. 420, 454). However, these forms were not provided to the courts without explanation, as appellees' would have us believe. In fact, significantly, in written guidance distributed with the forms, the Virginia Supreme Court specifically advised its lower courts:

> The use of "may" suggests that the statute contemplates the possibility that a judge could deny the petition, despite finding that the petitioner is mature. This possibility is reflected on our form order. The language of Bellotti and its progeny raise concerns about such a disposition.

principles of Virginia statutory interpretation, if not also as a matter of common parlance, it is clear that the word "may" can be construed as mandatory.[16] Compare Causeway Medical

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J.A. at 405, 439 (emphasis added). The materials then went on to explain the nature of the constitutional issues that would be raised by a discretionary maturity bypass. Thus, the Virginia Supreme Court did not purport to authoritatively construe the statute as authorizing a judge to exercise his discretion to deny a bypass to a mature minor. Rather, it acknowledged the existence of an important constitutional question that might arise from one possible construction of the statute and it left the resolution of the statutory construction and constitutional issues to the judicial process. Cf. Preface to the Virginia Supreme Court Materials, J.A. at 389 (explaining that some of the issues addressed by the materials "have no clear, definite resolution" and that the materials are intended to present the "competing arguments" on those issues).

[16] Indeed, the Commonwealth has argued in these proceedings that such a construction would be appropriate here. See Appellant's Brief at 29-30. The Commonwealth asserts that the statutory language that a judge "may authorize a physician to perform an abortion" upon a finding of maturity can reasonably be interpreted to mean that the judge shall authorize such an abortion except where such an abortion would otherwise be prohibited by law. According to this argument, the Virginia legislature may well have chosen the permissive term "may" because the Virginia statute authorizes the abortion itself, and not merely the minor "to act without parental consultation" as in Bellotti II. Given this, using "shall" rather than "may" would have had the effect of requiring judges to authorize abortions even where they would be affirmatively prohibited by other state abortion laws, such as Virginia's strict regulations on third-trimester abortions. See Appellant's Brief at 29-30. Interestingly, recognition of this kind of problem may have underlay, even if subconsciously, the Supreme Court's own transposition of the terms "may" and "shall" in Casey itself. The Pennsylvania statute there at issue did provide, as plaintiffs contend is constitutionally required here, that if both of the minor's parents refuse consent to the abortion, the court "shall" authorize a physician to perform the abortion after a hearing in which it is determined that the minor is mature. See Casey, 505 U.S. at 905 (Appendix). Notwithstanding the statute's use of the word "shall," the Court described the bypass provision as if it were (at least according to plaintiffs' arguments) permissive:

> If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination

Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) (rejecting similar construction of Louisiana consent statute where state legislature had amended the existing statutory term "shall" to read "may" and governing statute required that "may" be interpreted as permissive). In fact, the Virginia Supreme Court recently interpreted the term "may" to be mandatory, despite the inclusion of the word "shall" elsewhere within that same statute. See Harper v. Virginia Department of Taxation, 462 S.E.2d 892, 895, 898 (Va. 1995). So construed, of course, the statute's bypass provisions would be indistinguishable from those found within the statutes upheld in Akron II and Hodgson, and the statute's constitutionality would be beyond dispute. See Lambert, 117 S. Ct. at 1171-72.

Given that a reasonable construction of the Commonwealth's notice statute exists by which it would satisfy even the requirements for a consent statute -- including a mandatory bypass for the mature minor -- we, as a federal court, would be most reluctant to invalidate the measure facially before the state courts have even had an opportunity to construe the statute. As the Supreme Court has often reminded, our partners in federalism deserve more by way of comity than would be implied by such a hasty invalidation of the Commonwealth's responsibly enacted legislation. See, e.g., Akron I, 462 U.S. at 468-70 (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) (arguing that the majority improperly treated the consent requirement at issue as a blanket consent requirement without a best interest or

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> that the young woman is mature and capable of giving informed consent and has in fact given her informed consent .. . .

Id. at 899 (joint op.) (emphasis added). Accord Hodgson, 497 U.S. at 427 (op. of Stevens, J., for the Court) (stating that, under the Minnesota statute containing mandatory maturity and best interest bypasses, the "court can authorize" an abortion without notice when the minor is mature or when the abortion without notice is in her best interest (emphasis added)).

maturity bypass because there was "no reason to assume that the Akron [laws] compel state judges to notify the parents of a mature minor if such notification was contrary to the minor's best interests" and "no reason to believe that the state courts would construe the consent requirement to impose any type of parental or judicial veto on the abortion decisions of mature minors").

C.

Even if we were to accept, as decided law, that a parental notice statute must meet the identical requirements that a parental consent statute must meet in order to be constitutional -- not merely that a notice statute that includes a Bellotti II bypass is a fortiori constitutional, as we do for purposes of our analysis in Part VI.B. -- the fact that the Commonwealth's statute can reasonably be interpreted to include a mandatory maturity bypass would in itself still be sufficient to defeat appellees' facial challenge. For, under Virginia law, where a statute is susceptible to two interpretations, one of which would render the statute unconstitutional, the courts are required to interpret the statute so as to avoid its unconstitutionality.[17] And as a federal court reviewing such a statute -- especially a statute that has yet to be interpreted by the state courts because of federal court intervention before the statute's effective date -- we would be obliged to assume that the state courts would follow not only the state's own law, but also the Constitution. As the Supreme Court also has frequently observed in the specific context of

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[17] "There is a presumption that the legislature in the passage of an act did not intend to violate the constitution of the state or of the United States, and if such an act is susceptible of two constructions, one of which would make the same invalid as in violation of the state or federal constitutions and the other give validity to the act, the latter interpretation will be adopted upon the theory of legislative intent not to violate any provision of either of such instruments." 17 Michie's Jurisprudence of Virginia and West Virginia, Statutes, § 56.

federal court review of state abortion statutes, the federal courts, as a matter of federalism and comity, should not sustain a facial challenge to a state statute that has yet to be construed by state courts, when a reasonable construction exists which would eliminate the constitutional infirmity. See citations infra at 64, 79; see also Ashcroft, 462 U.S. at 493 (op. of Powell, J., joined by Burger, C.J.) (holding that a statute that arguably allowed the court for "good cause" to deny a mature minor the opportunity to bypass parental consent was properly construed by the court of appeals to require bypass whenever the court found the minor mature because "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality"); see also Manning v. Hunt, 119 F.3d 254, 270 (4th Cir. 1997) ("The Supreme Court has ruled, in the context of challenges to abortion regulations, that federal courts should not assume lightly that a state will not comply with Supreme Court mandates."). That such a saving construction would be available and appropriate if necessary to avoid the statute's invalidation proves the error in the district court's conclusion (even on its understanding of the Constitution as requiring a mandatory maturity bypass) that, while the federal courts and the Virginia state courts are obligated to construe state statutes so as to avoid their unconstitutionality, both the federal courts and the courts of the Commonwealth would be without the authority to "rewrite" what the district court characterized as the "express, carefully thought-out words of the Virginia General Assembly." Memorandum Op. at 12.

VII.

Our Constitution confers no more fundamental rights than those brought into relief by a statute requiring that the mother and father of a teenager with child be informed of the daughter's decision to terminate her pregnancy by abortion. A mother and father who assume the responsibility of the highest calling in life are entitled to the fullest possible measure of not

only constitutional solicitude, but constitutional encouragement, in their sacred endeavor. They are obliged to know, and they are entitled to know, the life-defining decisions their children face. By the same token, as the Supreme Court has held and recently reaffirmed, there are few rights more fundamental than that of a woman -- even a minor -- to decide herself whether or not to carry her pregnancy to term. We conclude today, however, that these liberties are fully compatible, each with the other, when the law requires what the Supreme Court itself has repeatedly characterized as "mere notice" by the child to the parent. To hold otherwise, we are convinced, would be to turn child from parent, and parent from child -- at the very moment in life when each is most in need of the other. Such a plenary violation of family the Constitution cannot be construed to require. Were it to be so, right would be they who said that with arrogance implacable we had our foundation rent asunder.

The preliminary injunction issued by the district court was in error and is vacated. The case is remanded for entry of judgment in favor of the Commonwealth of Virginia.

VACATED AND REMANDED

WILKINSON, Chief Judge, concurring:

The great turn-of-the-century astronomer, Percival Lowell, contributed much to our knowledge of the planets and the vastness of the cosmos. Pluto is named after him, the first two letters of its name being Percival Lowell's own initials. Lowell's lifelong passion, however, was the planet Mars. See generally William G. Hoyt, Lowell and Mars (1976).

Working from his observatory on Mars Hill in Flagstaff, Arizona, Lowell became convinced that Mars teemed with life. The lines on the planet's surface seemed to

him a vast network of canals, a huge planetary distribution system. Perhaps not surprisingly, the astronomer's theories on Mars bore an uncanny resemblance to Lowell's life on Earth, the extraterrestrial engineering feats mirroring the industrial revolution of the late nineteenth century and the Martian irrigation ditches alleviating conditions like those found in the observatory's own American Southwest. Fanned by Lowell's observations, a popular belief in a populated Mars took root. Id.

Lowell, of course, sought scientific truth, while we, as judges, go in search of legal, ethical, or philosophic certainty. Yet judges, no less than astronomers, have but a blurred, imperfect gaze upon the objects of their passions. Truth is as elusive to those learned in the law as to those versed in the stars, clouded as it is by new discovery and deep complexity.

Judges' observations need not resolve every highly-charged debate. In Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), this circuit properly upheld the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994, in which Congress acted to prevent nationwide violence and obstruction of access at abortion facilities. See also American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995). And today, this court sustains the constitutionality of Virginia's parental notification law. The binding principle of these decisions is not one of political philosophy, but of judicial restraint.

The astronomers of the bench do not have all the answers to such questions as: When does human life begin? Where does the role of the state in intimate decisions end? The perplexity of these questions perhaps explains why Americans remain so deeply and so passionately divided on the answers. On matters touching profound moral beliefs and intimate human freedom, a democratic system holds forth no prospect of agreement. What it does promise is a compromise

that disenfranchises no one and that, though fully satisfactory to few, may be partly satisfactory to many.

The compromise reached here, the Virginia Parental Notification Act, imposes only the mildest form of regulation upon the fundamental constitutional right to terminate an unwanted pregnancy. Va. Code § 16.1-241(V). The Act prescribes notification, not consent, and requires informing one parent, not two. The Act contains exemptions for medical emergencies and situations where the minor has been the victim of parental abuse or neglect. And the Act allows judicial bypass of the notification requirement both for mature minors who are capable of giving informed consent to an abortion and for any minor if an abortion without notice would be in her best interests. Though petitioners object that the Act says a court "may" rather than "must" waive notification in these circumstances, the Act is certainly susceptible to a construction that avoids this objection. Finally, the Act provides an array of procedural safeguards: a minor seeking to avail herself of the bypass procedure may act on her own behalf or the court may appoint a guardian ad litem; the minor shall be advised of her right to counsel and may request that counsel be appointed to represent her; all proceedings pursuant to the Act are confidential; and the Act outlines an expedited schedule for hearing bypass petitions and deciding appeals from adverse rulings. If the Act were a consent statute or otherwise imposed more onerous burdens on the abortion right, we would have a very different case.

To be sure, the legislative compromise here does not please everyone. The law does not go so far as to satisfy those who would condition abortion on the giving of parental consent. And it goes too far for those who would leave the decision of whether to consult a parent solely in the hands of a minor. The procedure for bypassing parental notification may be too cumbersome for some, and it may be too porous for others. But such things inhere in the nature of compromise.

Here, the compromise was reached after more than a decade of public debate. Virginia has taken a modest step to promote the consultation of parent and child in reaching the profound decision to terminate an unwanted pregnancy. This is not, as I read the Supreme Court's case law, an illegitimate exercise in democracy. So long as the core constitutional right is safeguarded, I understand the Court to say that democratic debate, at least at the margins, may continue. For all its raucous moments, such debate may ultimately unify Americans more than the Lowellian solution of a court.

WIDENER, Circuit Judge, concurring:

I.

I concur in the result, and I concur in the majority opinion.

II.

Left to my own devices, I would arrive at the same result by a more direct route. In my opinion, under existing precedent, a Virginia court which has found an infant to be mature but has declined to authorize an abortion upon request of the infant, has abused its discretion. So the use of "may" in the Virginia statute, which has caused all the commotion here, is of no moment. Along the same line, the infant may have chosen the notice route, or she may have chosen the bypass route. Since the statute, however, contains a bypass proceedure for a mature infant, the fact that she may choose the notice route is a matter of indifference, and that aspect of the statute does not invalidate it.

As the Virginia statute is thus construed, our case is indistinguishable from Akron II.

MICHAEL, Circuit Judge, concurring in the judgment:

The Virginia Parental Notice Act requires that unmarried women under eighteen notify their parents before they can obtain an abortion. The statute contains an exception to the notice requirement, however: if a Virginia juvenile court judge finds that the minor is mature and capable of giving informed consent, the judge "may authorize a physician to perform an abortion." Va. Code § 16.1-241(V). The plaintiffs argue that this statute gives a judge discretion to force a young (minor) woman to notify her parents before she can exercise her constitutional right to obtain an abortion, even if the judge concludes that she is mature and capable of informed consent. However, if "may" means "must," the statute would meet what I believe is the constitutional requirement that a parental notice statute have a mandatory judicial bypass for mature minors.

The United States Supreme Court has never directly decided whether a parental notice statute must accord mature minors a mandatory judicial bypass. The majority takes this as an invitation to ignore the implication of the Court's clear statements that the state's interest in encouraging parental involvement in the abortion decision must give way to a mature minor's constitutional right to obtain an abortion. It then overlooks the harmful consequences (physical and psychological abuse) that will surely befall many mature minors if all are forced to tell their parents of their wish to have an abortion. These harmful consequences cannot be ignored because under Casey they must be considered in determining whether a statute poses an undue burden on the abortion right. Yet the majority refuses to recognize that a parental notice statute without a mandatory bypass brings the prospect of abuse and intimidation for a large fraction of mature young women who choose an abortion but who do not wish to notify their parents. As a result, the majority comes to the erroneous conclusion that a statute lacking a mandatory bypass would not pose an undue burden on a mature minor's

right to an abortion. Because I believe the majority misreads the thrust of what the Supreme Court has said and refuses to recognize the harms that make parental notice statutes without a mandatory bypass an undue burden, I cannot join in its opinion.

However, the Virginia statute must be construed by the Virginia courts in accordance with the United States Constitution. Under Virginia law a statute that employs the word "may" will be interpreted to be mandatory rather than permissive if that is what the Constitution requires. Since the Constitution requires Virginia state judges to permit mature young women to obtain abortions without parental notice, the word "may" must be interpreted as a mandatory term. For that reason alone, I concur in the judgment that the Virginia statute is not unconstitutional on its face.

I.

I agree with the majority that the Supreme Court has never squarely held that a parental notice statute requires a mandatory judicial bypass just like a parental consent statute does. See Lambert v. Wicklund, 117 S. Ct. 1169, 1171 (1997). However, I do not understand how the majority can transform this lack of a square holding into "substantial authority" for the proposition that mature minors may be forced to notify their parents before exercising their right to choose an abortion. See ante at **[A-31]**. This flies in the face of twenty years of clear indications by the Court that mature minors share the same rights as adult women in exercising the abortion right. I believe there is little doubt that, if squarely presented with the issue, the Court would require a mandatory judicial bypass for mature minors.

The Supreme Court's insistence on the preservation of a mature minor's constitutional right to obtain an abortion free of parental obstacles has its origins in Bellotti v. Baird , 443

U.S. 622, 647 (1979) (Bellotti II). In Bellotti II the Court struck down a statute requiring that parents be notified of their minor daughter's desire to seek an abortion before she could obtain judicial consent, even though the Commonwealth of Massachusetts attempted to justify this requirement on the ground that it enabled the parents to argue in court that an abortion would not be in the minor's best interests. Writing for a four-Justice plurality, Justice Powell said, "[i]f [a minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent." Id. at 647 (plurality opinion) (emphasis added). While, as the majority notes, this statement did not command a majority, subsequent opinions have demonstrated the continued vitality of the statement that mature minors must be permitted to receive an abortion without parental notice. See, e.g., Hodgson v. Minnesota, 497 U.S. 417, 453-54 (1990) ("the constitutional defects that Justice Powell identified in the statute [in Bellotti II] - its failure to allow a minor who is found to be mature and fully competent to make the abortion decision independently and its requirement of parental consultation even when an abortion without notification would be in the minor's best interests -- are predicated on the assumption that the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child" (citing Bellotti II) (emphasis added, footnote deleted)).

In H.L. v. Matheson, 450 U.S. 398 (1981), the majority opinion declined to consider whether the Constitution required a mandatory judicial bypass for mature minors in a parental notice statute because the plaintiff did not argue that she was a mature minor. See id. at 406. However, Justice Powell (in a separate concurrence joined by Justice Stewart) said that "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is

mature enough to make the abortion decision independently or that notification otherwise would not be in her best interest." Id. at 420 (Powell, J., concurring). In the same case Justice Marshall noted in a four-vote dissent that the Court was "not question[ing] that exceptions from a parental notice requirement are necessary . . . for minors able to demonstrate their maturity." Id. at 428 n.3 (Marshall, J., dissenting). When the votes for Justice Powell's concurrence and Justice Marshall's dissent are combined, six justices agreed that a mature minor cannot be required to notify her parents before obtaining an abortion.

This principle was explicitly approved by the Court in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Akron I), overruled in part on other grounds by Planned Parenthood v. Casey, 505 U.S. 833, 881-83 (1992). The Court there held that a statute requiring parental notice for all minors under the age of fifteen without a case-by-case determination of whether a minor is mature is unconstitutional. The Court recognized the state's considerable interest in protecting children and encouraging parental involvement in such a weighty decision as whether to have an abortion, an interest the majority highlights in its opinion today. Nevertheless, the Court indicated that "these state and parental interests must give way to the constitutional right of a mature minor" to obtain an abortion. Id. at 428 n.10 (citing Justice Powell's concurrence and Justice Marshall's dissent in Matheson) (emphasis added).

I agree with the majority that a minor child's parents have a major interest in guiding the child's decisions, particularly on the important choices surrounding the matter of abortion. In Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992), the Court recognized that it had upheld some parental notice or consent statutes as constitutional "on the quite reasonable assumption" that minors benefit from consultation

with their parents.[1] On this point the Court referred to its prior decisions in Ohio v. Akron Center for Reproduction Health, 497 U.S. 502 (1990) (Akron II), Bellotti II, and Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). See Casey, 505 U.S. at 895. Those decisions approved only those statutes that permitted mature minors to opt out of the parental notice or consent provision through a mandatory judicial bypass. See, e.g., Akron II, 497 U.S. at 510-12 (upholding parental notice statute because it contained a mandatory judicial bypass for mature minors). This is consistent with the Court's prior statement in Akron I that a mature minor's constitutional right to an abortion outweighs the interests of the state and parents to require that the minor notify her parents about a planned abortion.

The Court's statements in these cases make clear that once a minor is found to be mature and capable of making an informed choice, she must be given the same consideration as an adult woman when it comes to her constitutional rights. See Bellotti II, 443 U.S. at 647 (plurality opinion); Akron I, 462 U.S. at 428 n.10; Hodgson, 497 U.S. at 453-54. Thus, the state cannot impose any restrictions on a mature minor's right to choose an abortion that cannot be imposed on an adult woman. See Planned Parenthood v. Miller, 63 F.3d 1452, 1460 (8th Cir. 1995) (Arnold, C.J.), cert. denied sub nom. Janklow v. Planned Parenthood, 517 U.S. 1174 (1996); see also Causeway Medical Suite v. Ieyoub, 123 F.3d 849, 851 n.3 (5th Cir. 1997) (Jones, J., dissenting from denial of reh'g en banc) (Under Bellotti II "[i]f the court finds [a young woman] sufficiently mature to make the abortion decision, that is the

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[1] A study reported in our record reveals that "in states without parental involvement laws in effect, the majority of unmarried minors having an abortion (61%) said that one or both of their parents knew about their abortion. Of the parent who knew about the pregnancy, 75% had been told by the daughter herself." In the majority of cases, therefore, notice occurs, and positive parental guidance can follow, without intervention by the state.

end of the matter. Neither the court nor the parents can tell her what to do"). Until today, this principle has led every circuit considering the issue to conclude that any statute which forbids mature minors from obtaining abortions without parental notice is unconstitutional unless it provides a mandatory judicial bypass. See, e.g., Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1104-06 (5th Cir. 1996), reh'g en banc denied 123 F.3d 849 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997); Miller, 63 F.3d at 1459-61; Zbaraz v. Hartigan, 763 F.2d 1532, 1536 (7th Cir. 1985), aff'd by an equally divided court, 484 U.S. 171 (1987); Indiana Planned Parenthood Affiliate Assoc. v. Pearson, 716 F.2d 1127, 1134 (7th Cir. 1983) (A parental notice statute "constitutionally cannot . . . give the juvenile court the authority to refuse to waive notification despite a finding that the minor is mature"). Against this background, I cannot agree with the majority's conclusion that the Constitution allows a state to forbid mature minors from exercising their right to an abortion unless they first notify their parents.

II.

In evaluating the constitutionality of the Virginia Parental Notice Act, the majority purports to apply the Supreme Court's test in Casey. Under this test if a statute restricting abortion has "the effect of placing a substantial obstacle in the path of a woman's choice," it is invalid on its face. In its analysis the majority only considers one possible effect of a statute that forces mature minors to notify their parents before having an abortion: that the minors may be "exposed to [their] parents' views" on the abortion decision. Ante at **[A-40]**. Unsurprisingly, the majority finds this effect not to be a substantial obstacle to the rights of mature minors, and it concludes that the Virginia statute is constitutional.

The majority's analysis slights the real and very serious consequences that a requirement of parental

notification without a mandatory judicial bypass would have for many mature young women who have very good reasons to avoid parental notice. These reasons include the fear and prospect of physical and psychological abuse by parents. The Supreme Court has held in the spousal notification context that these fears have the unconstitutional effect of placing a substantial obstacle in the path of a woman's right to choose abortion. Because many mature minor women would reasonably have similar fears of abuse under a parental notification statute without a mandatory judicial bypass, such a statute is also unconstitutional.

A.

In Casey the Supreme Court established a clear test for determining whether a statute restricting abortion could survive constitutional scrutiny. A statute is invalid on its face if it places an undue burden on a woman's right to have an abortion. An undue burden exists if the state regulation has "the effect of placing a substantial obstacle in the path of a woman's choice" to obtain an abortion. Casey, 505 U.S. at 877 (joint op. of O'Connor, Kennedy, and Souter, JJ.). A statute that creates a substantial obstacle for a large fraction of those women affected by the regulation creates an undue burden and is facially unconstitutional. See id. at 894-95.[2]

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[2] The majority seems to have some doubt about whether the "undue burden" standard used by the Court in Casey is the proper standard for facial challenges to abortion regulations, a doubt our court first articulated in dicta in Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997). The focus of the controversy hinges on whether the Casey "undue burden" test overruled United States v. Salerno, 481 U.S. 739 (1987), which indicated that a facial challenge must "establish that no set of circumstances exists under which the Act would be valid." Id. at 745.

I harbor no such doubts. Casey is clear on its face that the Court "set forth a standard of general applicability" for reviewing facial challenges to abortion restrictions. Casey, 505 U.S. at 876; see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J.,

In Casey the Court evaluated the constitutionality of a Pennsylvania statutory provision that required spousal notification before a married woman could obtain an abortion. The Court focused its analysis on the effects of the provision

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concurring in denial of application for stay and injunction pending appeal) ("In striking down Pennsylvania's spousal-notice provision [in Casey], we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" (emphasis and second alteration in original) (citation omitted)); cf. Janklow v. Panned Parenthood, 517 U.S. 1174, 1175 (1996) (Stevens, J., respecting the denial of certiorari) ("Salerno's rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context."); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 271-79 (1994) (noting that even before Casey, Supreme Court did not apply Salerno standard in the abortion context). I would therefore join the overwhelming majority of our sister circuits in accepting that the Casey undue burden test must be applied in facial challenges to abortion restrictions. See, e.g., Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998); Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996), cert. denied, 117 S. Ct. 2453 (1997); Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995) (Arnold, C.J.), cert. denied sub nom. Janklow v. Planned Parenthood, 517 U.S. 1174 (1996); Casey v. Planned Parenthood, 14 F.3d 848 (3d Cir. 1994) (on remand), stay denied sub nom. Casey v. Planned Parenthood, 510 U.S. 1309 (Souter, Circuit Justice 1994); Wicklund v. Lambert, 979 F. Supp. 1285 (D. Mont. 1997) (on remand) (citing Compassion in Dying v. Washington, 79 F.2d 790, 798 n.9 (9th Cir. 1996) (en banc), rev'd on other grounds sub nom. Washington v. Glucksberg, 117 S. Ct. 2258 (1997)).

I must also note that even the Fifth Circuit, the sole court to reject Casey and follow Salerno, has determined that a parental notice statute must include a mandatory judicial bypass for mature minors in order to survive a facial constitutional challenge. See Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1104 (5th Cir. 1996), reh'g en banc denied 123 F.3d 849 (5th Cir.), cert. denied, 118 S. Ct. 357 (1997).

At any rate, the majority claims that even under the Casey test, the Virginia statute is facially valid. Accordingly, I proceed by challenging this conclusion under Casey.

on "married women selecting abortions who do not wish to notify their husbands." Id. at 895. Relying on extensive factfinding by the district court, the Court concluded that several factors would tend to dissuade a large fraction of this class of women from seeking abortions even if they were legally entitled to one. These factors included the very real and tragic possibility of physical abuse. The Court noted that there is considerable undisputed evidence that violence against wives by their husbands is all too prevalent, affecting thousands of women every day. It further recognized that "[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during pregnancy and often the worst abuse can be associated with pregnancy." Id. at 889 (citation and internal quotations omitted).

The Casey Court also considered evidence of non-physical abuse or coercion that could prevent women from seeking an abortion. The Court observed:

> Many [women] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from [the] notification requirement.

Id. at 894. The Court ultimately concluded that because of the danger of physical and psychological abuse facing a large

fraction of married women who do not wish to notify their husbands about a planned abortion, a spousal notice statute posed the same undue burden on women as a statute giving the husband veto power over his wife's decision to have an abortion.

> Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in Danforth. The women most affected by this law -- those who most reasonably fear the consequences of notifying their husbands that they are pregnant -- are in the gravest danger.

Id. at 897. The court accordingly struck down the spousal notice provision as facially unconstitutional. See id.

B.

As I have said, the majority purports to apply the Casey "undue burden" standard in considering whether the Virginia parental notice statute passes constitutional muster. See ante at **[A-32]**. But instead of addressing the real effects of a mandatory parental notice statute, the majority builds a man of straw which it finds easy to knock down. The only possible effect of parental notice that the majority even considers is that the minor "may be exposed to her parents' views" on the abortion decision. Ante at **[A-40]**. By suggesting only such a minor burden, the majority is able to dismiss it with ease by asserting that parents have the right to guide their children through moral suasion.

The majority's argument fails to acknowledge the serious effects that parental notice of an abortion has for many young women under eighteen. It does not address the evidence in the record that a very real danger of physical and psychological abuse exists for a large fraction of those young women who would be forced (against their will) to notify their parents that they are pregnant and considering an abortion. These dangers are not only virtually identical to those which caused the Supreme Court to invalidate a spousal notification provision in Casey, but in one way the dangers are even more pronounced for mature minors. These young women are by definition dependent on their parents and therefore particularly vulnerable to the fear of parental abuse or coercion.

The most detrimental burden of a statute without a mandatory mature minor bypass would be the risk of physical harm to the minor by a parent. There is no doubt that child abuse is a pervasive problem in our society. See Council on Ethical and Judicial Affairs, American Medical Assoc., Mandatory Parental Consent to Abortion, 269 JAMA 82 (1993) (noting that there are about 1.5 million cases of child abuse every year in the United States). The Supreme Court itself recognizes a strong relationship between spousal abuse and child abuse. See Casey 505 U.S. at 891. One study, which is in our record, reveals that six percent of those minors who did not tell their parents about their pregnancy and abortion feared that they would be beaten if their parents found out. Yet the majority never acknowledges the possibility that a parent may abuse a child who reveals that she is considering an abortion.[3]

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[3] The case of Spring Adams, a young woman of 13 from Idaho, illustrates that this possibility is all too real. Adams became pregnant after being repeatedly raped by her father. When he found out that she was about to get an abortion, he shot and killed her. See Margie Boule, An American Tragedy, Portland Oregonian, Aug. 27, 1989.

While the Virginia statute does provide an exception for abused minors who meet certain criteria, these statutory requirements do not address the concerns of most young women who may be exposed to abuse. The Virginia statute only provides an exception for those cases where (1) the minor declares that she is abused and (2) the physician "has reason to suspect" that she is telling the truth and (3) the physician reports the abuse to the authorities. See Va. Code § 16.1-241(V). This procedure will not catch many of the cases where a parent might resort to physical abuse to dissuade a minor daughter from seeking an abortion. Child abuse, like spousal abuse, is shrouded in secrecy, and an abused young woman will be very reluctant to reveal her plight to a doctor she has just met. Cf. Casey, 505 U.S. at 889-90. Further, the statute's requirement that a minor must have already experienced abuse completely misses those cases in which revelation of a pregnancy might provoke an abusive situation that did not previously exist. See id. at 889; Mandatory Parental Consent, supra. Even worse, this provision places full power and discretion over the minor's constitutional rights in the hands of a third party, the physician, who would wield an effective veto over his patient's abortion choice by his sole and unreviewable determination that a declaration of abuse is not credible. This is exactly the kind of third-party veto that the Court has flatly rejected as a violation of a minor's constitutional rights. See Danforth, 428 U.S. at 74. I therefore believe that the statute's abuse exception is constitutionally inadequate to protect mature minors who are in danger of physical abuse if they notify their parents about their wish to have an abortion.

Beyond physical abuse, some mature minors, like some of the adult women in Casey, will also be subject to serious psychological abuse or intimidation that would pose a substantial obstacle to their right to seek an abortion. In response to being forced to notify their parents about their

intended abortion, some young women will be exposed to severe punishment short of actual battery. This punishment could include parents forcing the young women to leave the family home or denying them financial support. Data in the record show that eighteen percent of minors who declined to inform their parents did so because they feared being evicted from their homes. If anything, the potential consequences of such psychological abuse or intimidation are more severe for minor women, even mature minors, than for adult women because of their obvious dependence on their parents for support. This fact was recognized by the Supreme Court in Bellotti II: "[y]oung pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." 443 U.S. at 647 (plurality opinion). Psychological abuse and intimidation pose substantial obstacles to a mature minor's right to an abortion just as surely as does physical abuse. Again, the majority never considers that forcing young women to tell their parents that they wish to receive an abortion could have such harmful effects.

These consequences illustrate that parental notification without a mandatory bypass for mature minors permits parents to place much more significant (and harmful) obstacles than mere moral suasion in the path of young women's constitutional right to an abortion. The empirical evidence advanced by the plaintiffs demonstrates that the danger of parental retaliation, like that of spousal abuse, would likely dissuade a large fraction of mature minors -- forced against their will to notify their parents -- from exercising their right to an abortion. A parental notice statute without a mandatory judicial bypass, like the spousal notification provision overturned in Casey, would allow parents to resort to physical and psychological coercion, thereby placing a substantial roadblock in the path of mature young women who seek an abortion. This type of statute, which denies a mature minor sure recourse to the courts, is "tantamount to the veto found

(discussing spousal notification statute). Since such a statute creates an undue burden on the constitutional rights of mature young women, it is unconstitutional. I would therefore join every other circuit considering the issue and hold that parental notice statutes must contain a mandatory judicial bypass for mature minors.

III.

The majority suggests that if a mandatory bypass is a constitutional necessity for the mature minor, the Virginia statute "could reasonably be interpreted to require notice bypass for mature minors." Ante at **[A-64]**. The majority, however, does not hold that "may" has to be read as "must" in the bypass language of the Act. I would so hold.

The Virginia Supreme Court has in the past interpreted "may" to carry a mandatory rather than permissive meaning. In Harper v. Virginia Dept. of Taxation, 462 S.E.2d 892 (Va. 1995), for instance, the Virginia Supreme Court interpreted the term "may" in a statute to be mandatory, even though the word "shall" appeared elsewhere within the same statute, because a mandatory meaning accorded with the clear intent of the legislature. See id. at 895, 898; see also Whitlock v. Hawkins, 53 S.E. 401, 408 (Va. 1906) ("[w]here a statute can be construed in harmony with the fundamental law, the courts will adopt that construction, rather than one which will render the law void"); see generally 17 Michie's Jurisprudence of Virginia & West Virginia, Statutes § 56 ("[I]f . . . an act is susceptible of two constructions, one of which would make the same invalid as in violation of the . . . federal constitution[ ] and the other give validity to the act, the latter interpretation will be adopted" (footnote omitted)). In this case Virginia concedes that if a parental notification statute must constitutionally provide a mandatory judicial bypass for

mature minors, "'may' must be given a mandatory meaning." Appellant's Br. at 32.[4]

Construing the Virginia Parental Notice Act to read "may" as mandatory will require Virginia courts to authorize abortions for every minor found to be mature. There is no question that the Virginia parental notice statute thus construed would be constitutional. See Akron II, 497 U.S. at 510-13 (holding statute which provided mandatory bypass for mature minors constitutional). Accordingly, I concur in the judgment that the Virginia Parental Notice Act is constitutional on its face because the term "may" must be interpreted to be mandatory.

IV.

A quarter century ago in Roe v. Wade, 410 U.S. 173 (1973), the Supreme Court firmly established that women have the fundamental constitutional right to choose an abortion. Roe v. Wade has been under constant assault ever since. It has been inveighed against, campaigned against, legislated against, and litigated against. But it is still on the books, and one thing remains clear: a state law cannot place an undue burden on a woman's right to have an abortion. I think it inescapable that forcing parental notification without mandatory bypass on mature women under eighteen would be an undue burden on this right. Thus, when all is said and done, I believe the Supreme Court will uphold the right of

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[4] I am also persuaded by Judge Widener's statement that under Virginia law, any court that denied permission for an abortion to a mature minor would commit reversible error. See ante at 61 (Widener, J., concurring).

mature minors to choose an abortion without parental notification.

Judge Murnaghan, Judge Ervin, and Judge Motz join in this opinion.

Filed June 30, 1997

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA, on behalf of their unemancipated minor patients seeking abortions,

Plaintiffs,

v.

Civil Action No. 97-0043-C

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Defendant.

MEMORANDUM OPINION
By the Honorable James C. Turk,
United States District Judge

The Plaintiffs bring this civil rights action under 42 U.S.C. §§ 1983 & 1988, with jurisdiction vested in this court under 28 U.S.C. § 1331. The Plaintiffs are two individual

physicians and seven organizations which provide women's health services, including abortions. The Plaintiffs sue on behalf of their unemancipated minor patients seeking abortions. The Plaintiffs name as Defendant James L. Camblos, Commonwealth's Attorney for Ablemarle County, as a representative of the class of the Virginia Commonwealth's Attorneys. The Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 & 2202 and pursuant to Federal Rules of Civil Procedure 57 and 65.

The Plaintiffs challenge the constitutionality of the Parental Notice Act (hereinafter the "Act"), Va. Code Ann. § 16.1-241.V, which was passed during the 1997 session of the Virginia General Assembly. 1997 Va. Acts ch. 708. This legislation is scheduled to take effect on 1 July 1997.

This matter is before the court on the Plaintiffs' motion for the court to issue a preliminary injunction delaying the effective date of the Act. The Defendant has responded to the Plaintiffs' motion, and the court heard oral argument on the motion on 24 May 1997. The court has reviewed the briefs of the parties, the applicable law, and the record. For the following reasons, the court will grant the Plaintiffs' motion for a preliminary injunction restraining enforcement of the Act.

I. BACKGROUND

The Act prevents a physician from performing an abortion for a minor unless an authorized person, as defined by the Act, has been given at least twenty-four hours notice of the procedure. The Act defines "authorized person" to include a parent, a duly appointed legal guardian or custodian of the minor, or a person standing in loco parentis of the minor with whom the minor regularly and customarily resides. 1997 Va. Acts ch. 708.

The Act provides an exception to the notice requirement if the minor informs the physician that she has been the victim of abuse or neglect and the physician has reason to suspect that the child is in fact abused or neglected. The Act also provides for exceptions in cases where an abortion is immediately necessary to avert a minor's death or where there is insufficient time to provide the required notice because such notice would create a serious risk to the minor's health. Id.

Additionally, the Act provides a procedure for minors who do not wish to notify an authorized person of their intention to obtain an abortion. A minor seeking permission to proceed with an abortion without notifying an authorized person can file a petition with the Juvenile and Domestic Relations (hereinafter "J&DR") Court of the city or county in which she resides. Specifically, the Act provides that:

> V. Petitions filed by a juvenile seeking judicial authorization for a physician to perform an abortion if a minor elects not to allow notice to an authorized person. After a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion. If the judge determines that the minor is not mature, the judge shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's best interest, and if the court finds that the abortion would be in the minor's best interest, it shall so authorize a physician.
>
> ....

> Court proceedings under this subsection shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor. Court proceedings under this subsection shall be heard as soon as practicable but in no event later than four days after the petition is filed.
>
> Notwithstanding any other provision of law, ar expedited confidential appeal to the circuit court shall be available to any minor for whom the court denies an order authorizing an abortion without notice. Any such appeal shall be heard and decided no later than five days after the appeal is filed. An order authorizing an abortion without notification shall not be subject to appeal.
>
> No filing fees shall be required of the minor at trial or upon appeal.
>
> If either the original court or the circuit court fails to act within the time periods required by this subsection, the court before which the proceeding is pending shall immediately authorize a physician to perform the abortion without notice to an authorized person....

Id. This judicial bypass procedure is the subject of the controversy which is before the court.

The Plaintiffs allege that the procedures set forth for judicial bypass of the notification requirements of the Act are unduly burdensome on a woman's constitutional right to abortion because (1) the Act fails to require judicial authorization of abortion for "mature" minors; (2) the Act does not guarantee that judicial bypass will be expeditious;

and (3) the Act does not provide adequate guarantees of the minor's confidentiality. The Plaintiffs also allege that the Act's criminal provision, which makes non-compliance with the Act a crime for physicians, is void for vagueness.

II. PRELIMINARY INJUNCTION

The Fourth Circuit standard for determining whether or not to grant a preliminary injunction was set forth in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977). The district court must consider four factors:

(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
(2) the likelihood of harm to the defendant if the requested relief is granted;
(3) the likelihood that the plaintiff will succeed on the merits; and
(4) the public interest.

Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991). The court must first consider the likelihood of irreparable harm to the plaintiff and determine that such harm is "neither remote nor speculative, but actual and imminent." Id. (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)). The court then must proceed to determine the harm to the defendant and balance it against the harm to be suffered by the plaintiff if the preliminary injunction is denied. Id. at 812-13. When a court concludes that the balance of the hardships "'tips decidedly' in favor of the plaintiff," the court should grant the preliminary injunction if it finds substantial probability of success on the merits of the plaintiff's case. Id. at 813. Finally, the court must evaluate the public interest in

deciding whether to grant the preliminary injunction. Id. at 814.

A. Harm to the Plaintiffs

The court must first consider the harm to the Plaintiffs should the court deny the preliminary injunction in this case. The Plaintiffs allege that a minor's constitutional right to abortion would be interfered with if the Act were to go into effect on 1 July 1997. Specifically, the Plaintiffs allege that the judicial bypass provisions of the Act will deny minors their constitutional right to abortion by placing an undue burden on their exercise of that right.

The Fourth Circuit, considering the denial of a woman's constitutional right to abortion in the context of deciding an appeal of a preliminary injunction, has stated that "Roe v. Wade and Doe v. Bolton establish beyond argument that denial under color of law of the right to abort, implicit in the right to be let alone, constitutes irreparable injury." Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 644 (4th Cir. 1975) (citations omitted). Accordingly, the injury alleged -- the deprivation of a constitutional right -- is an irreparable injury under Fourth Circuit jurisprudence. Id.; Henry v. Greenville Airport Commission, 284 F.2d 631, 632-33 (4th Cir. 1960) (denial of constitutional right to travel constitutes irreparable injury).

The court must next confront the question of whether Plaintiffs' alleged harm is "actual and imminent." Direx Israel, 952 F.2d at 812. At present, Virginia does not require minors to notify their parents prior to obtaining an abortion. The Act, which requires such notification, will come into effect on 1 July 1997. Because the alleged harm is the denial of a constitutional right and because such alleged denial will take place beginning 1 July 1997, the court is of the opinion

that the Plaintiffs' irreparable harm in this case is "actual and imminent."

B. Harm to theDefendant

The second Blackwelder factor governing preliminary injunctions is the likelihood of harm to the Defendant if the requested relief is granted. Blackwelder, 550 F.2d at 194-95. This harm is to be balanced against the likelihood of irreparable harm to the Plaintiff. See Direx Israel, 952 F.2d at 812-13.

The Plaintiffs argue that the harm to the Defendant is minimal. First, the Plaintiffs correctly point out that, if the Act is unconstitutional, the Commonwealth of Virginia has no interest in having it effectuated. See Martin-Marietta Corp. v. Bendiz Corp., 690 F.2d 558, 568 (6th Cir. 1982). Second, the Plaintiffs assert that no financial or administrative burden will be placed on Virginia by an injunction prohibiting the enforcement of the Act and that such an injunction will place no other affirmative obligation on the Commonwealth.

The Defendant argues that, if the effective date of the Act is delayed, irreparable harm will be done to young women who seek abortions. The Defendant claims that young women who obtain abortions while the Act is suspended will do so without the benefit of mandatory notice to their parents. The Defendant has submitted affidavits of physicians attesting to the value of parental support for young women seeking abortions, including emotional support, informed choice, information regarding medical history, supervision of post-abortion care, support for a minor's psychological health, and family integrity. The Defendant asserts that the suspension of the Act will irreparably deny this support to young Virginia women.

The court concludes that the balance of the harms favors the Plaintiffs. As discussed below, see infra Part II.C, the court believes that the Plaintiffs have a substantial likelihood of success on the merits of their case. The language of the Act well may give J&DR judges the power to deny abortion authorization to "mature" minors in violation of Supreme Court case law. Because of the temporary nature of pregnancy, the denial of this constitutional right would irreparably harm pregnant minors. Therefore, temporarily enjoining the potentially unconstitutional Act benefits both the Plaintiffs and the Commonwealth. See Martin-Marietta, 690 F.2d at 568.

In contrast, temporarily enjoining the Act will not work an affirmative additional harm on any party, and will only maintain the status quo. The Virginia General Assembly -- which has considered various forms of the Act for at least a decade -- passed the Act earlier in the year and scheduled it to be effective on 1 July 1997. Had the Virginia General Assembly perceived an urgency in effectuating the Act, it could have enacted an emergency clause. It did not. Therefore, the court concludes that the balance of the harms to the parties favors temporarily enjoining a potentially unconstitutional statute and maintaining the status quo for the short time until a full hearing is held and a decision is made on the constitutionality of the Act.

C. Likelihood the Plaintiffs will Succeed on the Merits

The third Blackwelder requirement for a preliminary injunction is the likelihood that the Plaintiffs will succeed on the merits of their case. Blackwelder, 550 F.2d at 194-95. The Plaintiffs contend that they will succeed because the Act places an undue burden on young women by failing to: (1) require judicial authorization of abortion for "mature" minors; (2) guarantee that the bypass will be expeditious; and (3) provide adequate guarantees of the minor's

confidentiality. The Plaintiffs also contend that the Act is void for vagueness. The Court concludes that the Plaintiffs have a substantial likelihood of success on the merits of the first argument, and therefore only that argument will be addressed. Cf. Lambert v. Wicklund, ___ U.S. ___, ___, 117 S. Ct. 1169, 1170 (1997).

1. Standard of Review

The Supreme Court has not clearly addressed whether the standard of review for abortion cases is that of Planned Parenthood of Southeast Pa. v. Casey, 505 U.S. 833, 877 (1992), or that of United States v. Salerno, 481 U.S. 739 (1987). The Plaintiffs argue that the Casey "undue burden" standard applies in abortion cases, and that Casey left intact the Bellotti v. Baird, 443 U.S. 662 (1979) (hereinafter "Bellotti II"), standard of review for judicial bypass provisions in parental consent statutes. See Casey, 505 U.S. at 877; see also Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-13 (1990) (hereinafter "Akron II"). The Defendant argues that Salerno should apply. Salerno requires that in a facial challenge to a statute "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745.

Recent case law indicates that Casey and Bellotti II apply to both parental consent and parental notice statutes. In Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), the Eighth Circuit considered whether Bellotti II or Salerno applied to a parental notification statute. The court concluded that "the [Supreme] Court [in Casey, 505 U.S. at 833,] effectively overruled Salerno for facial challenges to abortion statues" and went on to apply the Bellotti II standard. Miller, 63 F.3d at 1458-59. Significantly, the Supreme Court denied certiorari of Miller, thereby leaving the Eighth Circuit's ruling intact. Janklow v. Planned Parenthood, Sioux Falls Clinic, ___ U.S. ___, 116 S.

Ct. 1582 (1996). In denying certiorari, Justice Stevens stated that the Salerno verbiage is "rigid and unwise dictum," "unfortunate," and "draconian." Id. at 1583; but see id. at 1584-86 (Scalia, J., dissenting, stating that the application of Salerno should be considered by the Court).

The Supreme Court reinforced the Eighth Circuit's Miller conclusion in Lambert v. Wicklund, 117 S. Ct. at 1169, when it reversed a Ninth Circuit decision which held the Montana Notice of Abortion Act unconstitutional under Glick v. McKay, 937 F.2d 434 (1991). In its opinion, the Court discussed the Ninth Circuit's application of the Bellotti II standard to the Montana act and concluded that the court had misapplied existing case law. Lambert, 117 S. Ct. at 1171. This discussion of the misapplication of the Bellotti II standard -- as opposed to the application of the wrong standard -- and the denial of certiorari in Miller lead this court to conclude that the Supreme Court intends for Casey and Bellotti II to be applied to parental notice bypass provisions. But see Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1103-04 (5th Cir. 1997) (declining to rule on the Casey-Salerno debate); Barnes v. Moore, 970 F.2d 12, cert. denied, 506 U.S. 1021 (1992). This court will therefore apply Casey and Bellotti II to the case at bar.[1]

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1 Other federal cases support this conclusion that Casey, not Salerno, applies to the review of abortion statutes. See Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996) ("We therefore agree with the Eighth Circuit in Miller that the proper test after Casey is the 'undue burden' standard applied by the Court in that case." (footnote and citations omitted)); Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1062 ("[T]his Court declines to apply Salerno to the challenged [abortion] regulations in this case."); A Woman's Choice - East Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1447-48 (S.D. Ind. 1995) ([T]his court believes that Casey effectively displaces Salerno's application to abortion laws."), appeal stayed, No. 95-3965 (7th Cir. Jan. 22, 1996).

Bellotti II requires that a judicial bypass satisfy four criteria. 443 U.S. at 622. First, the court hearing the young woman's request must authorize the abortion if "she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes." Akron II, 497 U.S. at 511. Second, the abortion must, in the case of an immature minor, be authorized if "the desired abortion would be in her best interests." Bellotti II, 443 U.S. at 644. Third, "the procedure must insure the minor's anonymity." Akron II, 497 U.S. at 512. Fourth, "courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion." Id.

2. "Must" and "Shall"

The Supreme Court has ruled that minors found to be "mature" must be authorized to have abortions without parental consultation:

> If [a pregnant minor] satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent....If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Bellotti II, 443 U.S. at 647-48 (emphasis added). The Act, in contrast, uses non-mandatory language in establishing procedures for J&DR judges to approve abortions for "mature" minors:

> After a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving

> informed consent to the proposed abortion....[I]f the court finds that the abortion would be in the minor's best interest, it shall so authorize a physician.

1997 Va. Acts ch. 708 (emphasis added). The Plaintiffs contend that the use of the verb "may" gives the J&DR judge discretion to refuse to authorize an abortion to a "mature" minor. This discretion, say the Plaintiffs, violates the law of Bellotti II, which states that once a minor is deemed "mature" she must be allowed to have an abortion. Bellotti II, 443 U.S. at 647.

The court finds the Plaintiffs' arguments persuasive. In Virginia, "'[w]hen the General Assembly uses two different terms in the same act, it is presumed to mean two different things.'" Klarfeld v. Salsbury, 355 S.E.2d 319, 323 (Va. 1987) (quoting Forst v. Rockingham Poultry Marketing Cooperative, Inc., 279 S.E.2d 400, 404 (Va. 1987)). The Act uses the verb "may" for "mature" minors and the verb "shall" for "best interest" determinations. A reasonable reading of the Act is that a J&DR judge must authorize an abortion if the judge determines that it is in the "best interest" of the minor, but the judge may or may not authorize the abortion if the minor is "mature." This discretion violates the Bellotti II rule for "mature" minors.

This conclusion is supported by the Fifth Circuit decision in Causeway, 109 F.3d at 1096.[2] In Causeway, the

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2 The Defendant contends that Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997), is unreliable because it relies upon Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), which misapplies Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983). The portions of Glick which the Defendant asserts are unreliable mainly deal with the expediency requirements for judicial bypass procedures, not with the Bellotti v. Baird, 443 U.S. 622 (1979), mandate for "mature" minors. Further, Causeway postdated the Supreme Court's decision on Glick and took the Glick reversal into account. Lambert v.

court held unconstitutional a Louisiana parental notification judicial bypass provision which stated that:

> If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court may issue an order authorizing the minor to act on the matter.

Id. at 1100 (citing and adding emphasis to the 1995 version of La. R.S. 40:1299.35.5(B)(4)). The court held that because "may" is permissive -- as opposed to the mandatory "shall" -- the Louisiana act gave judges unconstitutional authority to refuse authorization for abortions to "mature" minors. The court noted that "[a]s far as we are aware, every state with a parental consent or notification statute has used the mandatory 'shall' language in their [sic] bypass schemes." Id. at 1107 (footnote omitted); see also Miller, 63 F.3d at 1460 ("By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women."); Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1134 (7th Cir. 1983) ("The statute does not -- and constitutionally cannot -- give the juvenile court the authority to refuse to waive notification despite a finding that the minor is mature."). Based upon the wording of the Act, the Bellotti II rule, and the legal precedent, the court believes that there is a substantial likelihood that the Act is unconstitutional.

The Defendant puts forth several arguments to counter this conclusion. First, he contends that "may" means "shall" and therefore the Act is consistent with Bellotti II. The Defendant contends that state law must be construed in

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Wicklund, ___ U.S. ___, ___, 117 S. Ct. 1169, 1171 (1997); see also Causeway, 109 F.3d at 1105.

favor of constitutionality and therefore the court should read "may" in its "mandatory sense." In support of this argument the Defendant cites a state tax law case in which "may" was construed as mandatory. See Harper v. Virginia Department of Taxation, 462 S.E. 2d 892, 898 (Va. 1995) ("may" mandatory when mandatory interpretation complies with the "manifest purpose" of the statute).

This argument is unconvincing. The plain meaning of "may" is permissive and optional, whereas "shall" is mandatory and imperative. See Black's Law Dictionary 979, 1375 (6th ed. 1990). The different meaning of each word in the Act is emphasized by their use together: "may" is used for "mature" minors and "shall" is used in the same paragraph for the "best interest" of minors. The use of these words in such close proximity to each other highlights their contrast and indicates that the Virginia General Assembly deliberately used them in order to require different things. See Klarfeld, 355 S.E.2d at 319. While this court is required to construe state statutes in favor of constitutionality, it cannot rewrite the express, carefully thought-out words of the Virginia General Assembly. Cf. Virginia v. American Booksellers Association, 484 U.S. 383, 397 (1988). As the Fifth Circuit in Causeway considered and rejected construing "may" as "shall," so does this court. See 109 F.3d at 1106-07.

Second, the Defendant contends that "may" means "may" and is still consistent with Bellotti II. The Defendant contends that the Act gives "mature" minors all the rights of adult women seeking abortions but that these rights are not absolute. For example, Virginia law limits abortion after the second trimester of pregnancy to situations where the woman is in danger. Va. Code Ann. § 18.2-74(b) (Michie 1997); see also Va. Code § 18.2-71 (Michie 1997). The Defendant contends that the use of "may" in the statute reflects the duty

of judges to comport with Virginia state law and refuse to authorize unlawful abortions.

This argument requires the court not only to read "may" to mean "may," but also to read "shall" to mean "may." The Act states that if the judge determines that an abortion is in the minor's "best interest," the judge "shall" authorize the abortion. Following this "'may' is 'may'" argument, the Defendant implies that the General Assembly incorporated -- via the word "may" -- the Virginia law governing abortion into the sentence regarding "mature" minors but expressly omitted it -- via the word "shall" -- from the sentence regarding the minor's "best interest." This is the inverse of the "'may' is 'shall'" argument discussed above and suffers the same weaknesses. The court rejects it both as a matter of logic and for the reasons given above.

Finally, the Defendant argues that the Plaintiffs' argument is a worse-case scenario and assumes that J&DR judges will ignore the law of Bellotti II when they exercise their power under the Act. The Defendant argues that the law requires a presumption that judges will follow the law and the Constitution. See Akron II, 497 U.S. at 515. However, as already discussed, a plain reading of the Act would lead a judge to conclude that if the judge found a minor "mature" the judge "may" (or, implicitly, "may not") authorize an abortion, whereas if it is in the "best interest" of the minor the judge "shall," or "must," authorize the abortion. This is not a far-fetched, worse-case scenario; it is a reasonable reading of the Act. The court rejects this argument.

D. Public Interest

The fourth Blackwelder requirement for granting a preliminary injunction is whether granting the injunction is in the public interest. Blackwelder, 550 F.2d at 194-95. In this

case the central issue is a potentially unconstitutional statute which may violate citizens' constitutional rights. The public has no interest in effectuating an unconstitutional statute and "is always well served by protecting the constitutional rights of all its members." Reinert v. Haas, 585 F. Supp. 477, 481 (S.D. Iowa 1984); see also Martin-Marietta, 690 F.2d at 568. The injunction is therefore in the public interest.

III. CONCLUSION

For the reasons stated above, the court will grant the Plaintiffs' motion for a preliminary injunction. An order consistent with this memorandum opinion shall be entered this day.

Enter this 30th day of June, 1997.

/s/ James C. Turk
United States District Judge

Va. Code Ann. § 16.1-241(V)

Petitions filed by a juvenile seeking judicial authorization for a physician to perform an abortion if a minor elects not to allow notice to an authorized person. After a hearing, a judge may authorize a physician to perform an abortion upon finding that the minor is mature and capable of giving informed consent to the proposed abortion. If the judge determines that the minor is not mature, the judge shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's best interest, and if the court finds that the abortion would be in the minor's best interest, it shall so authorize a physician.

The minor may participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem for the minor. The court shall advise the minor that she has a right to counsel and shall, upon her reques. appoint counsel for her.

Court proceedings under this subsection shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor. Court proceedings under this subsection shall be heard as soon as practicable but in no event later than four days after the petition is filed.

Notwithstanding any other provision of law, an expedited confidential appeal to the circuit court shall be available to any minor for whom the court denies an order authorizing an abortion without notice. Any such appeal shall be heard and decided no later than five days after the appeal is filed. An order authorizing an abortion without notification shall not be subject to appeal.

No filing fees shall be required of the minor at trial or upon appeal.

If either the original court or the circuit court fails to act within the time periods required by this subsection, the court before which the proceeding is pending shall immediately authorize a physician to perform the abortion without notice to an authorized person.

A physician shall not knowingly perform an abortion upon an unemancipated minor unless notice has been given or the minor delivers to the physician a court order entered pursuant to this section. However, neither notice nor judicial authorization shall be required if the minor declares that she is abused or neglected and the attending physician has reason to suspect that the minor may be an abused or neglected child as defined in § 63.1-248.2 and reports the suspected abuse or neglect in accordance with § 63.1-248.3; or if, in the attending physician's good faith medical judgment, (i) the abortion is medically necessary immediately to avert the minor's death or (ii) there is insufficient time to provide the required notice or judicial authorization because a delay would create a serious risk of substantial impairment of a major bodily function or substantial physical injury. The attending physician shall certify the facts justifying the exception in the minor's medical record.

For purposes of this subsection:

"Authorized person" means: (i) a parent or duly appointed legal guardian or custodian of the minor or (ii) a person standing in loco parentis, including, but not limited to, a grandparent or adult sibling, with whom the minor regularly and customarily resides and who has care and control of the minor.

"Notice" means that (i) the physician or his agent has given actual notice of his intention to perform such abortion to an authorized person, either in person or by telephone, at least twenty-four hours previous to the performance of the abortion; or (ii) the physician or his agent, after a reasonable effort to notify an authorized person, has mailed notice to an authorized person by certified mail, addressed to such person at his usual place of abode, with return receipt requested, at least seventy-two hours prior to the performance of the abortion; or (iii) at least one authorized person is present with the minor seeking the abortion; or (iv) the minor has delivered to the physician a written statement signed by an authorized person and witnessed by a competent adult that the authorized person knows of the minor's intent to have an abortion.

"Perform an abortion" means to interrupt or terminate a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage as provided in §§ 18.2-72, 18.2-73 or § 18.2-74.

"Unemancipated minor" means a minor who has not been emancipated by (i) entry into a valid marriage, even though the marriage may have been terminated by dissolution; (ii) active duty with any of the armed forces of the United States; (iii) willingly living separate and apart from his or her parents or guardian, with the consent or acquiescence of the parents or guardian; or (iv) entry of an order of emancipation pursuant to Article 15 (§ 16.1-331 et seq.) of Chapter 11 of Title 16.1.

The ages specified in this law refer to the age of the child at the time of the acts complained of in the petition.

Notwithstanding any other provision of law no fees shall be charged by a sheriff for the service of any process in

a proceeding pursuant to subdivision 3 of subsection A or subsection B, D, M or R of this section.

Notwithstanding the provisions of § 18.2-71, any physician who performs an abortion in violation of subsection V shall be guilty of a Class 3 misdemeanor.

Excerpt from Attachment 5 to Exhibit B (Declaration of Steven L. Dalle Mura, executed June 23, 1997) to Defendant's Memorandum of Law in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction

ORDER IN PROCEEDING FOR JUDICIAL AUTHORIZATION OF ABORTION

Commonwealth of Virginia — Court Case No. VA CODE § 16.1-241(V)

PLEASE NOTE: ***All papers and hearings in this matter are confidential.***

.....Juvenile and Domestic Relations District Court

In re....., a Petitioner under the age of eighteen years

....
DATE OF BIRTH AGE SOCIAL SECURITY NUMBER

ORDER

☐ Following a hearing held on the petition for judicial authorization of an abortion without notice to an authorized person as defined in Virginia Code § 16.1-241(V), it is the finding of this court that

☐ the Petitioner is mature and capable of giving informed consent to the proposed abortion.

☐ The Petition is **GRANTED** and a physician is authorized to perform the proposed abortion on the Petitioner without notice to an authorized person.

☐ The Petition is **DENIED**.

NOTICE TO THE PETITIONER: If your petition is denied, you have the right to appeal this decision to the Circuit Court of this city or county. You must note your appeal with the Clerk of the Juvenile and Domestic Relations District Court within ten (10) days of the petition being denied. The Circuit Court will hear and decide your appeal no later than five (5) days after it is filed.

☐ the Petitioner is not mature and, therefore, the Court has determined whether the performance of an abortion without notice to an authorized person would be in the best interest of the Petitioner.

☐ Because the Court finds that the abortion would be in the Petitioner's best interest, the petition is **GRANTED** and a physician is authorized to perform the abortion on the Petitioner without notice to an authorized person.

☐ Because the Court finds that the abortion would not be in the Petitioner's best interest, the petition is **DENIED**.

NOTICE TO THE PETITIONER: If your petition is denied, you have the right to appeal this decision to the Circuit Court of this city or county. You must note your appeal with the Clerk of the Juvenile and Domestic Relations District Court within ten (10) days of the petition being denied. The Circuit Court will hear and decide your appeal no later than five (5) days after it is filed.

☐ The Court has advised the Petitioner that she has the right to a confidential appeal of the decision of this Court to deny authorization for an abortion without notice to an authorized person. This appeal will be heard and decided by the Circuit Court no later than five (5) days after the appeal is filed.

OR

☐ This Court did not act within the time period required by Virginia Code § 16.1-241(V). Therefore, a physician is **AUTHORIZED** to perform an abortion on the Petitioner without notice to an authorized person.

OR

☐ The petition is dismissed without prejudice because the petitioner did not appear at the hearing.

.....
DATE

_____
JUDGE

Excerpts from Attachment 4 to Exhibit B (Declaration of Steven L. Dalle Mura, executed June 23, 1997) to Defendant's Memorandum of Law in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction

[11] Section 16.1-241(V) explicitly requires the circuit court to *hear and decide* the matter no later than the fifth day after filing, but only directs the juvenile and domestic relations district court to *hear* the proceeding not later than four days after filing.

* * *

[17] V. "MAY" VS. "SHALL."

If the judge finds the petitioner to be "mature and capable of giving informed consent to the proposed abortion," the judge "*may* authorize a physician to perform an abortion." This stands in contrast to the "best interest" determination when, if the judge finds that the petitioner is not mature but that the abortion is in her best interest, the judge "*shall* so authorize a physician."

The use of "may" suggests that the statute contemplates the possibility that a judge could deny the petition, despite finding that the petitioner is mature. This possibility is reflected on our form order. Bellotti and its progeny raise concerns about such a disposition. *See* Bellotti, 443 U.S. at 649-51 ("[I]f the minor satisfies the court that she has attained sufficient maturity to make a fully informed decision, then she is entitled to make her abortion decision independently."). In addition, an extremely recent opinion of the Fifth Circuit **[18]** found constitutionally impermissible legislation which amended the Louisiana judicial bypass statute to change "shall" to "may" for both the "maturity" and "best interests" inquiries. Causeway Medical Suite v.

Ieyoub, No. 95-31178, 1997 WL 142113 (5th Cir. April 14, 1997). The court found the new statute defective "because it invests juvenile court judges with the discretion to deny a minor an abortion even though she plainly satisfies the Bellotti II requirements" of maturity or best interests. Id. at *14.

* * *

[23] (c) Taking the Matter "Under Advisement."

Section 16.1-241(V) explicitly requires the circuit court to *hear and decide* the matter no later than the fifth day after filing, but it directs the juvenile and domestic relations district court only to *hear* the proceeding not later than four days after filing. Therefore, while the circuit court cannot avoid issuing either a decision within the specified time frame or a "default authorization," it appears that the statutory language would permit the juvenile and domestic relations district court to take the matter under advisement.

Although the "advisement option" may be open to juvenile and domestic relations district court judges, exercising it liberally certainly conflicts with **[24]** the urgency of the proceedings, as reflected in the tight statutory time frames. Taking these petitions under advisement presents a serious "slippery slope" problem. Once the statutory four day time frame is breached, there is no corresponding statutory brake to apply when one begins to move down that "slippery slope." Too long a delay in adjudicating a bypass petition could have constitutional implications, in addition to the other dilemmas raised by lengthy advisements. Akron, 497 U.S. at 513 ("[C]ourts must conduct a bypass proceeding with expedition to allow the minor an effective opportunity to obtain the abortion."); Bellotti, 443 U.S. at 644. Another basis on which on which the Fifth Circuit enjoined enforcement of Louisiana's judicial bypass statute was the

statute's failure to "provide for an expeditious resolution of the minor's bypass application." Causeway Medical Suite, 1997 WL at *15. The court reached this conclusion because, although the statute directs that a hearing occur within 48 hours of filing, "the juvenile court is not required to rule on the minor's application within any specified time." Id. at *16. *See also* Glick v. McKay, 616 F. Supp. 322, 326, 327 (D.Nev. 1985) (the statute's failure "to set forth any time frame for the district court to render its decision" following the hearing is a "fundamental defect" and therefore, the statute must be enjoined).

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-834

In The

Supreme Court of the United States

October Term, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE, *et al.*,

Petitioners,

v.

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all Commonwealth's Attorneys in Virginia,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF JAMES L. CAMBLOS, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ALBEMARLE, IN OPPOSITION

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3288

QUESTIONS PRESENTED

1. The Court has expressly left open the question of whether a parental notice statute must contain a judicial bypass. Should the Court now decide this question, even though (a) the Virginia parental notice statute contains such a bypass, (b) the *en banc* court of appeals unanimously decided that this bypass would meet the requirements imposed on parental consent statutes, and (c) petitioners have not challenged this conclusion? If so, should the Court ignore the differences between notice and consent so as to hold both to the same standard?

2. Should the Court remand this case for the taking of additional evidence, even though (a) in oral argument below, petitioners waived any right to present additional evidence, (b) petitioners have proffered no evidence, (c) the issues in dispute are not factual, and (d) because of the unchallenged adequacy of the judicial bypass, the issues on which they seek evidence could not affect the ultimate disposition of the case?

3. The Court has never undertaken to define, in a single case, the specific parameters of parents' rights to direct the education and upbringing of their children. Should the Court now do so in order to forestall future challenges to various statutes potentially affecting these rights?

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BRIEF OF JAMES L. CAMBLOS, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ALBEMARLE, IN OPPOSITION

Respondent, James L. Camblos, Commonwealth's Attorney for the County of Albemarle ("the Commonwealth"), respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The decision was unanimous. The ten judges who heard this case in the court of appeals all agreed: the Virginia Parental Notice Act is constitutional. Such unanimity on an *en banc* court is rare and, standing alone, casts grave doubt on the worthiness of the petition for certiorari.

Six judges held that a parental notice statute – unlike a parental consent statute – need not contain a judicial bypass. Although four judges disagreed with this holding, the Act *has* such a bypass. All ten judges agreed that, if constitutionally required to have a *Bellotti*-type bypass, the Act's bypass would pass muster. The petition does not challenge this conclusion and, thus, cannot lead to an invalidation of the Act. The abstract constitutional debate sought by the petition is beyond the purpose of certiorari. Moreover, as shown below, it would be a debate to which plaintiffs would bring both misstatements of fact and gross misreadings of this Court's precedent. This is not the sort of case on which certiorari should be granted.

STATEMENT

By enacting its Parental Notice Act, Va. Code § 16.1-241(V) ("the Act"), in 1997, Virginia joined 26 other states[1] that require involvement by parents before physicians may perform abortions on their minor daughters. The Act is a one-parent notice statute. It has an exception for abused minors as well as a judicial bypass. Plaintiffs nevertheless challenged the Act on its face. Rebuffed by a unanimous *en banc* court of appeals, plaintiffs petition for a writ of certiorari. It is a petition replete with misstatements of fact and law, including the following:[2]

Concession at Oral Argument: Plaintiffs contend the court of appeals erred by deciding the case on its merits rather than remanding it to the district court for presentation of additional evidence. *See* Pet., Questions Presented, No. 2. The petition disputes the court of appeals' account of the concession made by plaintiffs at oral argument,[3] and claims the transcript of oral argument supports their

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[1] *See American Academy of Pediatrics v. Lungren*, 912 P.2d 1148, 1161, n.10, 12 Cal. 4th 1007, 1030, n.10 (1996)

[2] While some discrepancies may bear only limited relevance to plaintiffs' narrowly framed questions presented, the Commonwealth believes it may be helpful to assuage any concerns about the Act that the accumulation of multiple misstatements might otherwise engender. Thus, the Commonwealth provides a more comprehensive correction to the misstatements of the petition than required under Supreme Court Rule 15(2).

[3] The court of appeals said: "Recognizing that this dispute is ripe for consideration on the merits, *the parties themselves agreed at oral argument that further proceedings in the district court are not necessary* and that resolution of the merits of the dispute by this court would be appropriate." Pet. App. 16, emphasis added.

denial. Pet. 7, n.7. Yet, they have shown no transcript to the Court. Moreover, a tape of the oral argument on file with the Fourth Circuit clerk's office records the following exchange at the conclusion of plaintiffs' argument:

> COURT: We could, we could go ahead under, under *Thornburg I* and actually address the merits and resolve them even at the preliminary injunction stage by holding, at least a holding, that the judicial bypass is not, not required in a notice statute case.
>
> COUNSEL: Absolutely. This court could resolve the merits on this appeal. Thank you, your honor.
>
> [End of plaintiffs' argument]

Thus, plaintiffs made exactly the concession they now deny having made.

Evidence in Record: Plaintiffs are also disingenuous when, without further explanation, they describe the preliminary injunction hearing as "non-evidentiary". Pet. 6. The district court had before it 15 affidavits, together with many attached exhibits, creating a factual record of hundreds of pages. Plaintiffs' claim that they "have not had an opportunity to present evidence on critical facts" (Pet. at 6-7) is wholly without merit.

Confidentiality of Social Services: The petition complains that, by triggering the rescue of an incest victim, the Act's requirement that abuse be reported might allow her parents to learn of her abortion. Pet. 3, n.4. This betrays an utter lack of familiarity with Virginia social service procedures. In Virginia, social service agencies are required by regulation to keep confidential the identity of

those who report child abuse and neglect.[4] 22 VAC 40-705-40(E) ("When the identity of the reporter is known to the [State] Department [of Social Services] or local department, these agencies shall make every effort to protect the reporter's identity.") In order to overcome this requirement of confidentiality, the allegedly abusive parent must petition the circuit court and show, *inter alia*, a reasonable probability that the report was made with bad faith or malicious intent. Va. Code § 63.1-248.5:1. In light of these safeguards, it is extremely unlikely a parent would ever learn that the report came from a physician. Since the involvement of an abortion provider would be kept confidential, so, too, would the performance of the abortion. Additionally, the petition erroneously attributes to the court of appeals a holding that post-abortion notice to the parents of an abused minor would be permissible. Pet. 8. The court of appeals said no such thing.

Confidentiality of Records: The petition again misstates the case when it says "the Act contains no guarantee that court *records* or proceedings shall be confidential." Pet. 4 (emphasis in original). The Act's requirement to keep *proceedings* confidential would not be met if *records* of those proceedings were made available.

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[4] In light of this regulation, the risk of inadvertent parental notice of an abused minor's abortion decision is even more remote than the court of appeals described it. Pet. App. 51, n.8. Moreover, the Act did not create the reporting requirement. Since 1975, *all* Virginia physicians have been required to report suspected cases of child abuse or neglect. Va. Code § 63.1-248.3. 1975 Acts of Assembly, ch. 341.

Expeditiousness: The petition acknowledges that, under the Act, judicial bypass petitions must be heard by the Juvenile and Domestic Relations District Court ("JDR court") within four days of filing, but suggests the JDR court might delay a decision indefinitely. Pet. 5. The petition fails to mention significant facts bearing upon the speed with which the JDR courts render decisions on bypass petitions. Before hearing oral argument on March 3, 1998, the court of appeals granted the Commonwealth's unopposed motion to take judicial notice of facts pertaining to the operation of the Act between July 1, 1997 (when the Act took effect) and January 30, 1998 (the last month for which figures were available). These facts show that *every* bypass petition was heard *and decided* by the JDR court not later than the fourth day after filing.[5]

Emancipation in Virginia: In a claim not previously raised, the petition suggests there may be a class of minors who are emancipated, but who are denied the benefit of emancipation under the Act. Pet. 2, n.3. In fact, the converse is true. The benefits of the Act are broader. The bases on which a minor may obtain complete emancipation were codified by the 1986 enactment of Va. Code § 16.1-331 *et seq.* The Act starts with those same bases, but it does not stop there. Unlike the emancipation statute, the Act omits any age requirement as well as any requirement that the minor be capable of supporting herself and competently managing her own financial affairs. *Compare*

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[5] In one case, the fourth day fell on Saturday of the July 4th weekend. That petition was carried over and decided on July 7th, the next business day, a method of computation authorized by Va. Code § 1-13.3:1. *See also* Pet. App. 59-62.

Va. Code § 16.1-241(V) *with* §§ 16.1-331 and -333(iii). Thus, plaintiffs' concern is misplaced.

Medical Emergency: Plaintiffs are wrong when they deny waiving any right to object to the Act's medical emergency provision. The Commonwealth cannot find any such issue in their Complaint or in any other document filed in the district court. Moreover, it is not included among their questions presented. In any case, their objection to the Act's medical emergency provision is misplaced, because the Act uses language *less restrictive* than what has been already approved by the Court. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (citing 18 Pa. Cons. Stat. § 3203 (1990)); *see also* Pet. App. 49, 50, n.7 (majority opinion discussion of the Act's medical emergency provision).

Notice by Certified Mail: The petition misstates how notice under the Act may be accomplished by certified mail, saying that notice must be "delivered" 72 hours before an abortion. Pet. 3. The Act says nothing about when the notice must be delivered, only when it must be mailed.

Appellate Review: Contrary to plaintiffs' suggestion (Pet. 5), an appeal to the Virginia Court of Appeals from an unfavorable bypass decision is available under Va. Code § 17.1-405 (formerly § 17-116.05). An appeal to the Virginia Supreme Court from the Court of Appeals also may be granted in appropriate cases. Va. Code § 17.1-410

(formerly § 17.116-07). Confidentiality and expeditiousness are provided by the Act and/or by Virginia Supreme Court Rules 5A:13(c) and 5:18(c).[6]

"May" and "Shall": Plaintiffs complain about the court of appeals' decision – based squarely on state law – that "may" must be construed as "shall" if necessary to save the Act from unconstitutionality.[7] Pet. 8. Their complaint is flawed both legally and factually. Because this issue is not included in their questions presented, little need be said about it here, other than to alert the Court that the petition does not faithfully describe the views of the majority below, but confuses two entirely different parts of its opinion. *Compare* Pet. 8 *with* Pet. App. 55 and Pet. App. 66-67. Similarly, plaintiffs do not fully or accurately describe the guidance given by the Executive Secretary of the Virginia Supreme Court on this issue. *Compare* Pet. 4, 8, n.8 *with* Pet. App. 58-59, 61.

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[6] Plaintiffs' complaint that an appeal from JDR court to the circuit court is *de novo*, rather than on the record, is odd. Pet. 5. An appeal *de novo* is more favorable to the appellant because it allows the introduction of better evidence, and thus a greater chance of a different decision. Under the Act, the only party – and only possible appellant – is the minor.

[7] Even though plaintiffs now argue the court of appeals should have certified the interpretation of the word "may" to the Virginia Supreme Court (Pet. 8, n.8), they never sought such certification in the court below and, even now, do not include that issue among their questions presented. Moreover, concerns about violating federalism or comity are misplaced when a federal court *sustains* a state statute based on its assessment of how the state's highest court would interpret it.

REASONS TO DENY THE WRIT

The Petition purports to identify two reasons why certiorari should be granted. Neither reason can withstand scrutiny. First, the petition says the decision by the court of appeals conflicts with decisions of this Court on three important issues of federal law. Only by grossly misreading Supreme Court precedent – and by ignoring their own concession – can plaintiffs make such an assertion. Second, the petition says there is a conflict among the circuits. But any such conflict as may be found is more limited than plaintiffs contend, and this case does not furnish an adequate opportunity to resolve it. Moreover, the petition is flawed at the outset because the questions presented are so narrowly framed that, while they challenge one rationale used by the court of appeals, they do not challenge another, independent rationale that wholly supports the judgment below.

I. THE COURT OF APPEALS' JUDGMENT CANNOT BE OVERTURNED ON THE QUESTIONS PRESENTED BY PLAINTIFFS.

Even if plaintiffs could somehow prevail on all three questions presented, the court of appeals' judgment would still stand. This is so because that judgment, upholding the Act against a facial challenge, is based on two independent grounds, while the questions presented by the petition challenge only one of them.

The court of appeals held that a parental *notice* statute is not subject to the same constitutional requirements that govern parental *consent* statutes, and that a statute requiring notice to a non-abusive, non-absent parent need

not include a bypass for the mature minor in order to pass constitutional muster. Pet. App. 44. All three questions presented deal in one way or another with this holding. But, there is a second holding scarcely mentioned by the petition and based on Virginia law governing the interpretation of Virginia statutes.[8] All ten judges agreed that, if parental notice and consent statutes *were* governed by the same constitutional requirements, the Act would meet those requirements. As the six-member majority wrote:

> Even if we were to accept, as decided law, that a parental notice statute must meet the identical requirements that a parental consent statute must meet in order to be constitutional – not merely that a notice statute that includes a *Bellotti II* bypass is *a fortiori* constitutional, as we do for purposes of our analysis in Part VI.B. – the fact that the Commonwealth's statute can reasonably be interpreted to include a mandatory maturity bypass would in itself still be sufficient to defeat appellees' facial challenge.

Pet. App. 67.

Four other judges were prepared to decide that parental notice and consent statutes must meet the same constitutional criteria. Although in the minority on this

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[8] A third basis to uphold the Act was supported by five judges. In his concurrence, Judge Widner stated that, under Virginia law, it would be an abuse of discretion for a court to deny an abortion to a mature minor, a conclusion apparently founded on the unquestionable obligation of JDR and circuit courts to act in the best interests of the minor. Pet. App. 72. This opinion was supported by Judges Michael, Murnaghan, Ervin and Motz. Pet. App. 87, n.4.

point, they nevertheless concluded that the Act meets those criteria. It was on this basis that these four judges concurred in the judgment of the majority. Their opinion states:

> Under Virginia law a statute that employs the word "may" will be interpreted to be mandatory rather than permissive if that is what the Constitution requires. Since the Constitution requires Virginia state judges to permit mature young women to obtain abortions without parental notice, the word "may" must be interpreted as a mandatory term. For that reason alone, I concur in the judgment that the Virginia statute is not unconstitutional on its face.

Pet. App. 74.[9]

Thus, the *en banc* court of appeals was *unanimous* in its view that the Act complies with any constitutional requirements to which it might be subject under *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*") and related cases. The petition sometimes strays from the questions presented to fulminate against this conclusion; however, none of the questions presented challenge it and plaintiffs' gratuitous criticisms cannot be considered. Sup. Ct. R. 14(1)(a). Thus, the judgment of the court of appeals cannot be disturbed and the petition is simply an invitation to issue an advisory opinion. It is an invitation this Court should decline. As the Court has long emphasized, its role "is to decide actual controversies by a judgment

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[9] Plaintiffs' arguments that the Act fails to meet the confidentiality and expeditiousness requirements of *Bellotti II* were not deemed worthy of mention by the four judges concurring in the judgment.

which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). The Court need go no further in considering the petition. Certiorari should be denied.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S JURISPRUDENCE GOVERNING PARENTAL NOTICE STATUTES.

A. Their First Question Presented Is Based On A Misreading Of Supreme Court Precedent.

The first question presented by plaintiffs is based on their erroneous view that Justice Powell's plurality opinion in *Bellotti II* settled the question of whether a parental notice statute must have a judicial bypass. In an exercise reminiscent of reading tea leaves, plaintiffs spend pages poring over *Bellotti II* for any sign that might be taken as an omen favorable to their position. Pet. 12-16. The Commonwealth will not respond in kind. Such exegesis of *Bellotti II* is unnecessary. The Court has said plainly that the issue is open.

In *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (*"Akron II"*), the Court said:

> This dispute turns, to a large extent, on the adequacy of [the Ohio statute's] judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, *we have not decided whether parental notice statutes must contain such procedures. We leave the question open* . . .

497 U.S. at 510 (emphasis added) (citations omitted). *See also Lambert v. Wicklund*, 520 U.S. 292, ___, 117 S. Ct. 1169, 1171 (1997) (reiterating that the Court has "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional.").

The Court has made it perfectly clear that the issue is open. It is folly for the petition to pretend otherwise or to suggest that "a generation of young women" (Pet. 10) have relied upon a decision the Court has never made. Indeed, at one point, even plaintiffs admit – as they must – that the issue is "open". Pet. 17. Plaintiffs seek to avoid the consequences of their concession by hedging it with the suggestion that the question is only open "technically". *Id.* No such modifying adverb was used by this Court in describing the state of the law in *Akron II* and *Lambert*. The question is open, period.[10]

The petition also tries to escape the plain teaching of *Akron II* by its multiple misreadings of *Hodgson v. Minnesota*, 497 U.S. 417 (1990). *Akron II* and *Hodgson* were decided the same day. It would be very surprising to find any inconsistency between them. Nevertheless, plaintiffs stake their chances of certiorari on reading, between the

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[10] The petition tries to use the concurring opinion of Justice Stevens in *Akron II* to create a distinction between *judicial* bypasses and bypasses in some other, unidentified form. Pet. 17. The view that some type of non-judicial bypass is required has never been adopted by a majority of the Court. Moreover, *Lambert* describes the undecided bypass issue in terms broad enough to foreclose the distinction plaintiffs seek to make. *Lambert*, 520 U.S. at ___, 117 S. Ct. at 1171.

lines of *Hodgson*, a teaching that *Akron II* rejects in its plain text.

First, plaintiffs say the decision below violates *Hodgson's* reaffirmation of *Bellotti II*'s requirement that a mature minor be allowed to make the abortion decision "independently." Pet. 18. Nothing in the Act requires minors to obtain the consent of their parents, nor even to consult with them. So, plaintiffs equate the abortion decision with the abortion procedure and construe the term "independently" to mean "without notice." But, there is an obvious difference between a minor's making her decision independently and her having the abortion in secrecy from her parents. To suggest that this Court implicitly meant to equate the two concepts not only runs afoul of logic and the English language, it flatly contradicts the explicit statements in *Akron II* and *Lambert* that the issue is an open one.

Second, in an effort to recast *Hodgson* to suit themselves, plaintiffs ask this Court to read Justice O'Connor's concurring opinion not just as a criticism of Minnesota's faulty abuse exception, but as a much broader judgment that all abuse exceptions are constitutionally suspect. Pet. 18. Justice O'Connor issued no such sweeping condemnation.[11] Moreover, as the court of appeals readily

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[11] The decision by the court of appeals contains an extensive and persuasive analysis of Justice O'Connor's concurring opinion in *Hodgson*. Pet. App. 51, n.8. But even without this analysis, there is no way that Justice O'Connor's opinion – or *Hodgson* in general – can be read to *foreclose* the judgment reached by the court of appeals or the rationale of its majority. The alleged conflict with existing Supreme Court jurisprudence does not exist.

recognized, the safeguards adopted by Virginia are fundamentally different – and far more stringent – than the troublesome Minnesota procedures at issue in *Hodgson*.

The decision of the court of appeals contains extensive explanation of the confidentiality protections of Virginia law. Pet App. 51, n.8. As the court pointed out, those protections contrast markedly with the Minnesota law giving a parent under investigation "a right of access to the record of the investigation." *Id.* (quoting *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring in part and concurring in judgment in part) (citation omitted)). Additionally, the Commonwealth has at least one protection not discussed below in that social service agencies in Virginia are required by regulation to keep confidential the identity of persons who report suspected abuse. 22 VAC 40-705-40(E); *see* p. 4, *supra*. Public officials are presumed to discharge their duties properly, absent clear evidence to the contrary. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). There is no such evidence here. If the court of appeals had focused on this regulation, then its already high confidence in the Virginia procedure would have been even greater. Indeed, whatever danger of inadvertent parental notice may have existed in Minnesota, it is foreclosed in Virginia as a matter of law.

Unable to address this issue with any credible legal argument, plaintiffs rely on a sensational 1989 newspaper story about one Rocky Adams, who was "accus[ed]" of "murdering his daughter after she was impregnated by him and sought an abortion." Pet. 19. But what does that have to do with Virginia? The horrible events to which plaintiffs allude did not occur here, but in Oregon. Rocky Adams did not learn of his daughter's abortion through

any breach in the wall of confidentiality erected by the Commonwealth. For plaintiffs to seek certiorari based on an event so irrelevant to the case at bar serves only to underscore the petition's lack of merit.

Third, the petition criticizes the court of appeals for the "breathtaking assumption" that "state interests supporting parental notice are advanced rather than undermined by a statute that grants judges the discretion to compel parental notice for a mature minor." Pet. 19. This is puzzling. To say that a state's interests in parental notice are advanced by requiring notice is hardly breathtaking. It is a tautology.

In sum, plaintiffs cannot sustain their claim that the court of appeals' decision is contrary to the jurisprudence of this Court. Their first question presented is without merit.

B. Their Second Question Presented Has Been Waived, And Is Otherwise Inappropriate For Certiorari.

By their second question presented, plaintiffs seek to remand the case to the district court for the taking of additional evidence. Such a remand has been waived. In proceedings below, when presented with the suggestion that the case was ripe for a decision on the merits, plaintiffs' response was "Absolutely".[12] As shown by their opinions on the merits, all ten judges agreed. *See, e.g.*, Pet. App. 16. Plaintiffs' concession was appropriate, and it is

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[12] *See* excerpt from tape of oral argument, p. 3, *supra*.

now too late for them to retract it. Moreover, they identify no evidence they would submit if the matter were to be somehow remanded. Their ruminations about what additional evidence "could" show are pure speculation. *See* Pet. 21, n.18. Certiorari on this issue would be both improper and pointless.

Additionally, what plaintiffs belatedly seek to portray as issues of fact are clearly matters of law, including matters on which this Court has already spoken. For example, they claim that whether parental consent is more burdensome than parental notice is a factual matter. Pet. 7. Yet, this Court has already recognized the "greater intrusiveness of consent statutes" as compared to notice statutes. *Akron II*, 497 U.S. at 511.[13]

Plaintiffs also claim the court of appeals "improperly assumed" that mature minors will benefit from notice to non-abusive parents. Pet. 21. Yet, the benefits of parental notice have been recognized repeatedly:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help

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[13] Contrary to plaintiffs' suggestion, whether a statute creates an undue burden is a question of law, not a question for the finder of fact. Moreover, the usefulness of an extensive factual record in making the legal judgment varies greatly depending upon whether the Court has previously passed upon the burden created by the particular type of statute at issue. In *Casey* for example, the Court reviewed a spousal notice requirement for the first time, and thus engaged in a degree of factual examination unnecessary in this case where the Court has previously ruled on the constitutionality of parental notice statutes.

> and advice of her parents in making the very important decision whether or not to bear a child.

Hodgson, 497 U.S. at 444 (Stevens, J. and O'Connor, J.) (concurring) (citation omitted).

It is not surprising that the Court has thus far declined to make an exception to this principle when the minor is mature. There are legitimate state interests – recognized by this Court – that plainly are not satisfied just because a minor is mature enough to make the ultimate decision whether to have an abortion. For example:

- For a minor to be mature enough to make her own abortion decision does not mean she will know the medical history that can be crucial in avoiding complications, including infertility and death. *See H. L. v. Matheson*, 450 U.S. 398, 411 (1981) (parental notification serves "a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician . . . ").

- Maturity does not immunize a minor against the possibility of post-abortion complications, nor does it eliminate the benefit of having a parent supervise post-abortion care. *See Hodgson*, 497 U.S. at 429, n.11 (noting importance of parental notice continues even after abortion is performed).

- Parents have a moral and legal responsibility to provide their minor daughter with necessary care. *See Buxton v. Bishop*, 185 Va. 1 (1946) (recognizing parents' common law liability to third party for necessities furnished to unemancipated minor child); Va. Code § 20-16 (establishing criminal liability for willfully neglecting to

provide support and maintenance of minor child). By promoting early detection of post-abortion complications, parental notice helps avoid the sometimes devastating financial and other consequences of complications that fester in secret.

- The need for parental supervision of a minor's post-abortion care – instead of self-supervision – is especially acute since the potential complications include psychological problems that may easily elude self-detection. *See Hodgson*, 497 U.S. at 429, n.11 (parental notice can help support a minor's psychological health).

- Considerations of family integrity are also important even after a minor daughter has become mature enough to make the abortion decision on her own, and they continue to be important through the date of her emancipation, whether by age or otherwise. *Matheson*, 450 U.S. at 411 (parental notice statute addresses "important considerations of family integrity").[14]

In light of this galaxy of concerns, even if the Court were one day to decide that a parental notice statute must have a judicial bypass, it is unlikely simply to duplicate the requirements that *Bellotti II* imposes in the context of parental consent statutes. This is not, however, the day to address such an issue because the court of appeals held the Act would meet any requirements that might be imposed even under a *Bellotti II* standard and because this holding is not challenged in the questions presented by plaintiffs.

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[14] The court of appeals' discussion of state interests appears at Pet. App. 32-39.

C. Their Third Question Presented Seeks Debate Over Statutes Not At Issue Here.

In discussing their third question presented, plaintiffs reveal their desire to conduct a pre-emptive defense of laws they fear might be imperiled by a vigorous assertion of parental rights. They focus on the Virginia law treating minors as adults for purposes of consenting to a range of health care services involving sexually transmitted diseases, birth control and pregnancy, substance abuse, mental illness and emotional disturbance. Pet. 24 (citing Va. Code § 54.1-2969(D)(1)-(4)). The Commonwealth does not share plaintiffs' concern that its law is jeopardized by the decision below, and believes that plaintiffs' frenzied concern is wholly unnecessary.[15] These statutes were not at issue in the case below. Indeed, the court of appeals never so much as mentioned them, much less suggested how it would rule if constitutional challenges were to be mounted. Such challenges, if they ever come, must be decided on an individual basis, not by the wholesale approach sought by plaintiffs in their request for certiorari.

Moreover, the Court need not take up this case in order to set down the broad principles by which future contests over parental rights must be decided. It has

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[15] Plaintiffs also try to incite alarm by claiming that, under the court of appeals' decision, even adult women would be forced to consult with their parents before having abortions. Pet. 24-25, n.21; 28. Such an intellectually undisciplined argument is so transparently meritless as to require no response, and is a further indication of the inappropriateness of this case for certiorari.

already done so, and anyone wishing to challenge – or defend – any statute implicating those rights has ample authority on which to draw. Parents are supported by a long line of cases recognizing the right "to direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, ___, 117 S. Ct. 2258, 2267 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). *See also Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Even so, parental rights are not absolute. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).[16] States have authority to *support* the role of parents as well as authority to *limit* parental decisions in some circumstances so as to protect the welfare of children. *See Ginsberg*, 390 U.S. at 639 ("Parents [have] primary responsibility for children's well-being [and] are entitled to the support of laws designed to aid discharge of that responsibility.") and *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding authority of states to enact laws prohibiting child labor even when labor is approved by parents).

The Court has not sought to define in the abstract the exact parameters of these sometimes competing, sometimes concurring principles. How they might play out in

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[16] The role of the Constitution in fixing boundaries between the rights of parents and the rights of their children was expressly recognized by the court of appeals when it referred to the parents' right "to rear their child as they see fit, and to participate fully in that child's life, as free from governmental interference as *constitutionally permissible*." Pet. App. 32 (emphasis added).

the context of any particular statute must await a case and controversy dealing with that statute. To pass upon such statutes in advance, by using this case to codify the interplay of applicable principles, would not be in keeping with the caution exercised by this Court in developing its constitutional jurisprudence. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Clinton v. Jones*, 520 U.S. 681, ___ n.11, 117 S. Ct. 1636, 1642, n.11 (1997) (citation and internal quotation marks omitted); *see also* Pet. App. 70 (Wilkinson, C. J.) (explaining that the philosophy of judicial restraint rests on the understanding that "astronomers of the bench do not have all the answers to such questions as: When does human life begin? Where does the role of the state in intimate decisions end?").

Finally, in the context of the case at bar, it makes absolutely no difference whether the parental right to know about a minor daughter's abortion derives from the broader parental right to direct the education and upbringing of children, recognized in *Glucksberg*, or whether it derives from the presumption, recognized in *Hodgson*, that it is in the best interest of the children that their parents know about such decisions. *Hodgson*, 497 U.S. at 450.[17] Whatever may be its origin, the Act tempers the right of parental notice with a judicial bypass. Thus, any conflict between the two possible derivations is

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[17] Plaintiffs' suggestion that parents have no independent right to know about their children's activities exaggerates and distorts the teaching of *Hodgson*.

safely avoided. In their third question presented, plaintiffs ask the Court to grant certiorari based on differences in nuance that are entirely moot. The Court should not do so.

III. GRANTING CERTIORARI COULD NOT RESOLVE ANY CONFLICT AMONG THE CIRCUITS.

A. The Issue Of Whether A Parental Notice Statute Needs A Bypass Cannot Be Reached.

The petition notes a conflict among the circuits on whether a parental notice statute must contain a judicial bypass meeting the criteria of *Bellotti II*. Three circuits have said that it must do so. The Fourth Circuit has said that it need not. This is not, however, a case where that conflict can be resolved. The Act *has* a bypass. Moreover, all ten circuit court judges agree that the bypass would meet any requirements that may be imposed by *Bellotti II*, a point not challenged by the questions presented in the petition.

In *Akron II*, the Court expressly declined to resolve the open question of whether parental notice statutes must contain judicial bypass procedures. The Court chose not to take up the issue because the statute then before it contained a judicial bypass meeting all constitutional requirements for parental consent statutes. The Court said: "We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [the Ohio statute's] bypass procedure meets the requirements identified for parental consent statutes. . . . " 497 U.S. at 510.

Following the approach of *Akron II*, this Court should not use this case to take up the issue of whether a notice statute needs a bypass. The *en banc* court of appeals held *unanimously* that the Act's bypass passes the test of *Bellotti II*, thereby making this case an unlikely vehicle for reaching the larger issue. Moreover, because plaintiffs frame their questions presented so as not to challenge this holding, any possibility of using this case for resolving a conflict among the circuits on the larger issue has been eliminated.

B. The Issue Of Expeditiousness Is Outside The Questions Presented And Involves No Conflict.

In an apparent afterthought, the petition concludes with a claim that the circuits are in conflict on what is necessary to meet *Bellotti II*'s requirement for expeditiousness in a judicial bypass.[18] The short answer to the argument is that the adequacy of the Act's expeditiousness requirement is not fairly included within any of the questions presented. Sup. Ct. R. 14(1)(a). Additionally, the language by which the Act guarantees expeditiousness was approved by the Court in *Hodgson* and, insofar as the *Hodgson*-approved language is concerned, disagreement among the circuits does not exist.

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[18] The court of appeals' discussion of expeditiousness appears at Pet. App. 59-62. *See also* "Expeditiousness," p. 5, *supra*.

In *Hodgson*, this Court upheld the Minnesota parental notice statute with judicial bypass language making the following provision for expeditiousness:

> Proceedings in the court under this section . . . shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

Hodgson, 497 U.S. at 427, n.9 (quoting Minn. Stat. § 144.343(6) (1988)).

The Virginia statute uses virtually identical language. It says:

> Court proceedings under this subsection . . . shall be given precedence over other pending matters so that a court may reach a decision promptly and without delay in order to serve the best interest of the minor.

Va. Code § 16.1-241(V).

Moreover, the Virginia statute also says the hearing must be held "as soon as practicable and *in no event later than four days after the petition is filed.*" *Id.* (emphasis added). By contrast, the Minnesota statute gave *no* deadline for when the hearing must be held. Because the Minnesota statute is constitutional, then *a fortiori* the Virginia law is constitutional.[19]

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[19] This Court has *never* required bypass proceedings to contain a deadline for decision-making expressed with mathematical specificity. *See Akron II*, 495 U.S. at 514 (describing *Ashcroft* as upholding bypass procedure that "could require 17

The petition claims the decision by the Fourth Circuit on expeditiousness conflicts with *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) and *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 357 (1997). *Glick* and *Causeway* are both distinguishable from the case at bar in that the statutes in those cases failed to track the Minnesota language approved by this Court in *Hodgson*.

The Nevada statute invalidated in *Glick* did not "require that the district court conduct its petition review with expediency." *See Glick*, 937 F.2d at 441 (citing Nev. Rev. Stat. § 442.2555).[20] Likewise, the Louisiana statute invalidated in *Causeway* contained provisions for expeditiousness markedly different from those used by the Act. It required that the bypass petition be decided "in a

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calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels."); *Planned Parenthood Assoc. of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983) (upholding Missouri statute that specified how quickly the bypass hearing must be held, but did not expressly state how quickly thereafter a decision must be rendered).

[20] The Ninth Circuit was also unpersuaded that the Nevada statute was similar to the Missouri statute upheld in *Ashcroft*, noting that Nevada failed "to support their argument with evidence that the Missouri statute did not impose a time constraint on the district court's review of a minor's petition." 937 F.3d at 440. The Ninth Circuit reached this conclusion without its attention being drawn to that portion of *Ashcroft* containing the text of the Missouri statute. If the court's attention had been so directed, it would have noted that the Missouri statute *does not* contain a specific deadline. *See Ashcroft*, 462 U.S. at 479, n.4. Certiorari in the case at bar is an inappropriate remedy to correct the failure in *Glick* to read carefully the plain text of *Ashcroft*.

summary manner." But, under Louisiana law, this only meant "as soon as practicable" or "whenever practicable." *Causeway*, 109 F.3d at 1110 (citing La. Civ. Code art. 2595 (West 1996)). This was a far less rigorous demand than the Minnesota and Virginia requirements that petitions be given "precedence" and decided "promptly and without delay."

In sum, the statutes in *Glick* and *Causeway* were materially different from both the Minnesota statute approved by this Court in *Hodgson* and the Virginia statute approved by the Fourth Circuit in the case at bar. Thus, the alleged conflict between the circuits on the issue of expeditiousness is illusory.

CONCLUSION

Reeling from a unanimous defeat before an *en banc* court of appeals, plaintiffs come to this Court with a petition that is fundamentally flawed. Their questions presented are framed so as to challenge part of the rationale used by the court of appeals, but not its ultimate judgment that the Act is constitutional. Moreover, their petition is predicated on a gross distortion of Supreme Court precedent, on a misrepresentation about their concession before the court of appeals, on a desire to litigate the constitutionality of statutes not at issue here and on circuit court conflicts that are non-existent or that cannot be reached because of the narrow framing of their

questions presented. This petition should not be granted. Certiorari should be denied.

Respectfully submitted,

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(4)

No. 98-834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Petitioners,

—v.—

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners Planned Parenthood of the Blue Ridge, *et al.*, respectfully submit the following reply brief in support of the petition for certiorari.

ARGUMENT

1. The Respondent ("the state") points to a claimed concession regarding the need for further factual development by counsel for the Petitioners at oral argument before the court below. The quoted portion of the argument, however, only shows that counsel conceded what must be conceded: that the court of appeals has the *authority* to reach the merits on an appeal from a preliminary injunction. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986). The transcript of the argument shows quite clearly that counsel for Petitioners did *not* believe that to be an appropriate course of action for the court of appeals if its merits ruling would involve a holding that notice statutes, as a matter of law, require no judicial bypass for mature minors.[1]

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[1] Although the transcript of the oral argument is somewhat garbled, it nevertheless establishes that counsel believed further factual development would be required depending on the holding reached. The section of the transcript immediately preceding the portion of the argument quoted by the state reads as follows:

> THE COURT: Do you need any evidence?
>
> MR. HELLER: I think. [sic]
>
> THE COURT: I think is [sic] what Judge Niemeyer is getting at, or at least is my question. Do we have to have any facts?
>
> MR. HELLER: That would depend in part on whether this court determines that parental notice statutes requires [sic] a Bellotti type bypass or doesn't or require something between Bellotti type bypass and no bypass at all. The thing is where this court finds on that.

Oral Argument Transcript at 40 (4th Cir. Mar. 3, 1998).

2. The decision below is *not* based on two "independent grounds," as the State claims. *See* Opp. Br. at 8.[2] On the contrary, the second "independent ground" -- that the word "may" is mandatory in the Act -- is *entirely* dependent on a holding *opposite* that reached by the court below.

The holding of the court below is, as correctly described by the State, that "a statute requiring notice to a non-abusive, non-absent parent need not include a bypass for the mature minor in order to pass constitutional muster." *Id.* at 8-9. The "independent ground" asserted by the State is that "if parental notice and consent statutes *were* governed by the same constitutional requirements, the Act would meet those requirements." *Id.* at 9 (emphasis in original). The claim that this is an "independent ground," however, puts the cart before the horse. The court below held, at great length, that notice and consent statutes are *not* governed by the same constitutional requirements. Any holding that the Act "can reasonably be interpreted to include a mandatory maturity bypass," A-67, would not be reached unless the opposite holding -- the one mandated by this Court's precedents -- were *first* reached. Because the court of appeals held that notice statutes do not require a mandatory maturity bypass, the *dicta* that the Act could be construed to contain such a bypass is rendered meaningless. The proper course of action, then, is summary vacature of the decision of the court below with instruction to determine whether the Act indeed may be interpreted to comport with the bypass requirements established in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*").[3]

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[2] Citations to the Brief in Opposition are given in the form "Opp. Br. at __"; to the Petition, in the form "Pet. __"; and to the Appendix to the Petition, in the form "A-__." Section 16.1-241(V) of the Virginia Code is referred to below as "the Act."

[3] As Petitioners have already argued, such a construction, if rendered by a federal court, flies in the face of the construction given the Act by the Virginia Supreme Court's administrative arm, and therefore violates

In other words, the state's "independent ground" is not truly independent because it leads to a different result; a truly independent ground supporting a judgment leads to the same result. The result of a holding that the Act passes constitutional muster because it contains a mandatory bypass for mature minors is that such a bypass must be implemented. In direct contrast, the result of the holding below is that such a mandatory bypass need not, and indeed should not, be implemented, because none is required by the Constitution. Absent re-affirmation by this Court that mature minors are entitled to obtain an abortion without parental involvement, the proposed construction that "may" is mandatory will remain an intangible potentiality for minors in Virginia. Only a holding by this Court that a mature minor is entitled to a bypass could lead to a mandatory construction of "may," if indeed such a construction is possible. *See* n.3 *supra*.

3. The State's argument utterly rejects any meaningful status for minors found mature under the Act's bypass. Indeed, the status of "maturity" is entirely irrelevant, in the state's view, to the minor's privacy right to decide on her own to obtain an abortion; for even if she is found mature, a variety of other "legitimate state interests . . . plainly are not satisfied . . . " Opp. Br. at 17.[4] What role, then, does the

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principles of federalism and comity. *See* Pet. at 8 n.8. Petitioners do not argue, as the State claims, *see* Opp. Br. at 7 n.7, that the court below should have certified the construction of the Act to the Virginia Supreme Court, for the Act has already been construed by the responsible state agency. Rather, Petitioners argue that a *rejection* of the construction adopted by that agency may only be achieved by resort to a pronouncement of the Virginia Supreme Court itself, and not by a federal court. Federalism is as much violated by a federal court construction of a state statute that saves the statute, if that construction would be rejected by the state supreme court, as it is by a construction that condemns a statute.

[4] Nor is there any evidence that any of the State's litany of interests would be served by denial of a judicial bypass to a mature minor. Indeed,

finding of maturity play in the Virginia statute? Under the state's view, it is merely an irrelevancy that not only *may* but *should* be disregarded by state judges hearing bypass requests, in order to further a host of state interests the state contends remain legitimate even in the case of a mature minor.[5] This chain of reasoning stands in direct conflict with Justice Powell's opinion in *Bellotti II*, under which a State is prohibited from notifying the parents of a minor found to be mature of her intention to obtain an abortion. *Id.*, 443 U.S. at 647 (opinion of Powell, J.).

4. Moreover, the State's theory of the judicial bypass runs contrary to the function of the maturity evaluation. A finding that a minor is mature enough to make an informed decision to abort on her own is, simply put, a "partial emancipation" of the minor -- partial insofar as it is limited to the question of whether the minor is capable of deciding on her own whether to obtain an abortion.[6] Just as the state has disavowed an interest in compelling parental involvement in the case of a completely emancipated minor -- such as one who has joined the United States Armed Forces or one who has ever entered into a valid marriage, A-107 -- so too the state has no interest in compelling parental involvement in the decision of a minor found by a judge to be "mature and capable of giving informed consent to the proposed

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elsewhere the State appears to concede this lack of fit by writing that the Act does not require minors "even to consult with" their parents, but only requires notice. Opp. Br. at 13. Surely mere notice without consultation cannot serve any of the interests the state claims are legitimate in the case of a mature minor.

[5] Three of the five examples of state interests asserted to be legitimate in the case of a mature minor seem actually to collapse into one interest: assistance with post-abortion care. *See* Opp. Br. at 17-18.

[6] Virginia law recognizes that "[e]mancipation of a minor may be express or implied, partial or complete. . . . Partial emancipation frees the child for only a part of the period of minority, or from only part of the parents' rights, or for some special purpose . . ." *Brumfield v. Brumfield*, 74 S.E.2d 170, 173 (Va. 1953).

abortion." A-105. The state offers no reasonable explanation for why the state's asserted interests in compelling notice to the parents of a minor found mature by a state judge are not also present in the case of a minor who is on active duty in the military.[7] Absent such an explanation, the requirement of notice in the case of a minor partially emancipated by a finding of maturity is entirely unreasonable. Just as the unreasonableness of Minnesota's two-parent notice requirement was confirmed by the lack of such requirements in other state consent provisions for minors, *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990), the Virginia law's arbitrary discrimination between categories of partially emancipated (i.e., mature) and completely emancipated minors is further confirmation of its unreasonableness. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("unique and puzzling regulatory framework" of beer labeling statute confirms its irrationality).[8]

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[7] The state explicitly concedes, for example, that "[c]onsiderations of family integrity . . . continue to be important through the date of her emancipation, *whether by age or otherwise*." Opp. Br. at 18 (emphasis added). The state fails to explain why its interest in promoting family integrity persists in the case of a minor as to whom a state judge has made a particularized assessment of sufficient maturity to make the abortion decision in an informed manner, but evaporates in the case of a minor on active duty in the military.

[8] This argument is only strengthened by the state's observation that the Act actually creates broader categories of per se emancipation than does the Virginia statute governing emancipation of minors generally. *See* Opp. Br. at 5. There are thus three categories of emancipated minors under the Virginia law: (1) those who are emancipated for all purposes under the Virginia statute governing emancipation generally by such events as enrollment in the military; (2) those who meet the *Act's* definition of emancipation, but would not meet the general statute's definition; and (3) those found mature by a state judge. There is no rational explanation for the state to preserve its power to mandate parental notice for minors in category (3) while disavowing that power utterly for minors in categories (1) and (2). Indeed, if anything, it appears that the minors in category (3) should be entitled to proceed without

5. In addition, a maturity finding under the Act and under the decision of the court below does not entitle the minor to anything: she may well be left in the same position she was in before she requested a bypass. Viewed in this light, the bypass proceeding is transformed into a purely arbitrary burden for the mature minor. No other judicial process -- let alone one involving time-sensitive constitutional rights -- imposes this type of Kafkaesque result on litigants. Under the Virginia law, mature minors simply do not know what rule of law -- if any -- will determine whether they are granted a bypass or not. *See generally* LON L. FULLER, THE MORALITY OF LAW 34-35 (1964) (one way to "fail to make law" is to keep secret the rules for deciding cases).

6. The state asserts anew that there is an independent parental "right to know" about the mature minor's abortion, and that it is a "distort[ion]" of "the teaching of *Hodgson*" to deny the existence of such a right. *See* Opp. Br. at 21 & n.17. But this Court in *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976), held: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to become pregnant." The court below holds that an independent interest, yea an independent *right*, of the parent to know about the mature minor's abortion outweighs the mature minor's privacy right to obtain an abortion in consultation only with her physician. That decision is thus in conflict with *Danforth*.

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notice, because they have been found partially emancipated for the purpose of making the abortion decision itself, while, of course, enrollment in the military or a prior marriage involves no particularized assessment of the minor's capacity to make the abortion decision.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

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